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In The

Supreme Court of the United States

October Term, 1997

COLIN LINDSAY, EXECUTOR OF THE ESTATE OF PEDRO SOSA, DECEASED,

Petitioner,

v.

JEFFERSON COUNTY AND JEFFERSON COUNTY DEPARTMENT OF CORRECTIONS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In *Board of County Commissioners v. Brown*, 520 U.S. ___, 117 S. Ct. 1382, 1387 L. Ed. 2d 626 (1997), this Court recently held that rigorous standards of culpability and causation are necessary to prevent municipal liability under 42 U.S.C. § 1983 from collapsing into *respondeat superior* liability in cases involving a *single*, facially lawful decision.

The questions presented in this case are:

1. Whether the rule of law expressed in *Brown* applies where municipal § 1983 liability is based on a *policy* that has proven inadequate, rather than a *single*, facially lawful decision.

2. Whether a municipal policy that has a proven record of failing to prevent violations of federally protected rights satisfies the rigorous standards expressed in *Brown*.

3. Whether this Court's prohibition against *respondeat superior* liability in the context of municipal § 1983 liability should be reexamined.

LIST OF PARTIES TO PROCEEDING BEFORE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1. Colin Lindsay is the Executor of the Estate of Pedro Sosa, and was the Appellee in the proceeding before the United States Court of Appeals for the Sixth Circuit. He is the Petitioner here.

2. The names of the Appellants in the proceeding before the United States Court of Appeals for the Sixth Circuit were:

   a) Jefferson County, Kentucky.

   b) Jefferson County Department of Corrections.

3. The United States Court of Appeals for the Sixth Circuit remanded the verdicts against the following Appellants. Because that issue is not addressed herein, the following individuals are not named as parties herein:

   a) James Angelini, Officer, Jefferson County Department of Corrections.

   b) G. S. Colvin, Officer, Jefferson County Department of Corrections.

   c) Brett O'Loughlin, Officer, Jefferson County Department of Corrections.

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PETITION FOR A WRIT OF CERTIORARI

Colin H. Lindsay, Executor of the Estate of Pedro Sosa, Deceased, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered on September 29, 1997.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY THE COURTS

1. Jefferson County, et al. v. Lindsay, No. 96-5840, Order Den. Reh. En Banc (6th Cir. 12/1/97) (unpublished)
2. Jefferson County, et al. v. Lindsay, No. 96-5840, Slip Op. (6th Cir. 9/29/97) (unpublished)
3. Sosa v. Jefferson County, et al., No. 3:95CV-229-J, Amended Judgment (W.D. Ky. 5/21/96) (unpublished)
4. Sosa v. Jefferson County, et al., No. 3:95CV-229-J, Judgment in a Civil Case (W.D. Ky. 3/7/96) (unpublished)

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

Invoking federal jurisdiction under 28 U.S.C. § 1331, Petitioner brought this suit in the Western District of Kentucky. On March 7, 1996, the Western District Court of Kentucky rendered a judgment in favor of Petitioner's Decedent.

In Jefferson County, et al. v. Lindsay, No. 96-5840, Slip Op. (9/29/97) (unpublished), the Sixth Circuit entered a judgment and opinion reversing the District Court's judgment. Sosa, Slip Op. at 9, *infra*. Petitioner sought a rehearing with suggestion for rehearing *en banc*, which were denied in an Order entered December 1, 1997. Pursuant to Supreme Court Rule 13.1 and 13.3, this Petition has been filed within ninety (90) days of the denial of rehearing. Jurisdiction to review this Petition for Writ of Certiorari is invoked pursuant to 26 U.S.C. § 1254(1) and in conformity with 26 U.S.C. § 2101(c) and Supreme Court Rules 10, 12 and 13.

PERTINENT CONSTITUTIONAL PROVISIONS, TREATISES, STATUTES, ORDINANCES AND REGULATIONS

1. **Eighth Amendment, United States Constitution:**

   Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. **Fourteenth Amendment, Section 1, United States Constitution:**

   All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws.

3. **42 U.S.C. § 1983**

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunity secured by the Constitution laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a case of cruel and unusual punishment that occurred in the Jefferson County Jail in Louisville, Kentucky. It was prosecuted by a Plaintiff who had nothing to gain save the vindication of the constitutional principles on which his claim was based.

On September 1, 1994, Pedro Sosa – 26 years old, Puerto Rican, gay, and suffering from Acquired Immune Deficiency Syndrome ("AIDS") – went to a bar where he drank about four glasses of beer. R. 106 P. Sosa at 2/28/96 TR 44-46. When he left the bar, he was accosted by a white male in a suit who was never identified. *Id.* at 46. When a policeman arrived at the scene, he questioned the

unidentified white male, but let him go. *Id.* at 49. Pedro, on the other hand, was required to remain at the scene and answer questions. *Id.* at 47-48. When Pedro revealed that he was suffering from AIDS, the officer told Pedro to get into the police car and took him to jail. *Id.* at 48-49.

Although the citation prepared by the police reflected the cause of Pedro's arrest as "public intoxication," court documents indicated that Pedro was arrested because he allegedly refused to get out of the policeman's car. R. 106 A. Bybee at 2/28/96 TR 87-89. In any event, a videotape of Pedro entering the jail showed an individual who was alert and cooperative, and who, by the admission of the corrections officers, followed all instructions given to him, and did precisely as he was told. Plaintiff's Exhibit 1, at 2/28/96 TR 112; R. 106 J. Lee at 2/28/96 TR 121. The videotape shows, however, that when Pedro balked at removing his socks and shoes because he wanted to know why he had been arrested and wanted to make a telephone call, his feet were kicked out from under him, he was pushed to the ground, and his shoes and socks were forcibly removed. R. 106 P. Sosa at 2/28/96 TR 52-53, 75 and J. Lee at 2/28/96 TR 117.

At approximately 6:30 p.m., after Pedro had been fingerprinted and photographed, he was placed in the only isolation cell having no toilet. R. 106 P. Sosa at 2/28/96 TR 54. Gay inmates typically are placed in isolation cells at the Jefferson County Jail. Pet. App. 77. As a result of having AIDS and the medications associated with his illness, however, Pedro suffered from persistent diarrhea and needed ready access to a bathroom. R. 106 P. Sosa at 2/28/96 TR 55. He pounded on the door of his cell to attract the attention of the jail officers in the

vicinity, an accepted and expected practice of inmates in isolation cells at the jail. R. 106 P. Sosa at 2/28/96 TR 55; Pet. App. 72-73. However, instead of giving Pedro access to the facilities he desperately needed, officers instructed Pedro to quit banging on the door or be put in shackles. R. 106 P. Sosa at 2/28/96 TR 56. Pedro, who did not know what the word "shackles" meant, and who was increasingly desperate for access to a bathroom, continued to bang on the door of his cell. As a consequence, at approximately 9:15 p.m., Pedro was shackled, wrists and ankles, to the strut of the bench in his cell. R. 106 P. Sosa at 2/28/96 TR 56, 58-59, 61. There he remained for four hours, until he was released from his shackles at 1:15 the following morning. R. 106 S. Colvin at 2/28/96 TR 178. At some point in that period of time, Pedro – who had been refused access to a bathroom since his arrest – lost his fight to restrain his bladder and bowels, and urinated and defecated on himself. R. 106 P. Sosa at 2/28/96 TR 57. (Given the desperation with which he had sought access to a toilet, this accident likely occurred soon after Pedro was shackled to the bench.) As a consequence, Pedro was required to sit in his own wastes for as long as four hours.

Later that morning, after Pedro's clothes were cleaned and returned, he was released on his own recognizance. Despite the charge for which he was arrested, he was never given a breathalyser or even a field sobriety test. There was no explanation for the treatment to which Pedro was subjected other than who – and what – he was. After his release, Pedro went immediately to the home of a friend, Donna Jackson, who observed bruises around

Pedro's wrists and ankles and a severe rash on his buttocks. R. 106 D. Jackson at 2/28/96 TR 238-239. These injuries occurred as Pedro struggled against his shackles to get out of his own wastes. R. 106 P. Sosa at 2/28/96 TR 67-69.

Pedro sued Jefferson County, its jail, its acting director, and the officers directly responsible for the ordeal he had endured, for violating his rights under the Eighth Amendment to the United States Constitution. The first trial on Pedro's Eighth Amendment claims ended in a hung jury.[1]

The evidence at the second trial showed that the officer who ordered Pedro shackled to the bench – Sgt. G. S. Colvin – had previously been cited for failing to control his temper. The officer who left Pedro in shackles for four hours – Sgt. Brett O'Loughlin – had three previously documented instances of inmate abuse. R. 106 B. O'Loughlin at 2/28/96 TR 195-207; Pet. App. 21-34. These incidents involved (a) unjustifiably applying a choke hold to an inmate, (b) spraying mace on inmates already locked in a cell, (c) packing 21 inmates into a 12-passenger van on a hot summer day. *Id.* A fourth incident

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[1] The videotape referenced earlier showed that Plaintiff was required to open his pants during a search conducted as he was processed into the jail. This search, and another more invasive search which Pedro contended occurred off-camera and immediately after his entry into the jail, formed the basis of a separate claim that he had been searched in violation of his rights under the Fourth Amendment. However, the first jury to hear Pedro's case concluded there had been no violation of the Fourth Amendment. This claim was dropped and is not an issue in this petition.

occurred after Pedro's incarceration, when O'Loughlin taped shut the mouth of an inmate who spat at him. *Id.* Jail authorities themselves acknowledged this last incident involved a prisoner's Eighth Amendment rights and would "shock the conscience" of the public. Pet. App. 46-47. Yet, O'Loughlin received only a mere written reprimand for these offenses, comparable to the discipline one would receive for four tardies. Pet. App. 40, 42, 48. The jail's bankrupt disciplinary system was clearly ineffective at deterring O'Loughlin's propensity for inmate abuse.

Even more shocking was the fact that, prior to Pedro's arrest, O'Loughlin was *promoted* by virtue of Jefferson County's contract with the Teamsters Union, which represents the jail's employees. Pet. App. 44-45. Under that contract, the County agreed not to take into account in its promotion decisions acts of inmate abuse (or any other offense) occurring more than nine months before. Pet. App. 44-45. Even the acting director of the jail at the time of Pedro's incarceration, Joe Payne, admitted that he did not agree with such a policy. Pet. App. 80-81. It was by virtue of his promotion to shift supervisor that O'Loughlin had the authority to determine when Pedro would be freed from his shackles. He exercised that authority by permitting Pedro to remain shackled in his own feces and urine for as long as four hours.

The jury in the second trial was outraged and returned substantial verdicts against both the jail and the County.[2] The jury reasonably inferred from the evidence

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[2] A separate verdict against Officers Colvin, O'Loughlin and James Angelini has been remanded for further proceedings and is not an issue in this petition.

that the jail's failure to deter inmate abuse through the application of appropriately punitive disciplinary procedures, and the County's Agreement to a contract in which a propensity toward inmate abuse could play no part in promotional decisions occurring nine months after the last violation, were the "moving force" behind the deprivation of Pedro's Eighth Amendment rights.

Tragically, only months after the jury's verdict, Pedro succumbed to the ravages of his illness. Less than a year later, Donna Jackson, too, passed away. Pedro Sosa has had his day in court. But in an unpublished *per curiam* opinion, a Sixth Circuit panel composed of the Hons. Richard F. Suhrheinrich, Robert B. Krupansky and Gerald E. Rosen,[3] reversed the judgment against the County and the jail, citing this Court's recent decision in *Board of County Commissioners v. Brown*, 520 U.S. ___, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). *Brown* was decided April 28, 1997, after the parties had already submitted their briefs on appeal. While Petitioner attempted to distinguish *Brown* for the panel during oral argument, additional briefing was not invited. A petition for rehearing and suggestion for rehearing *en banc* were also denied.

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[3] The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, served as a member of the panel by designation.

REASONS FOR GRANTING THE WRIT

Issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case is appropriate because the Sixth Circuit's decision creates a standard for municipal liability under 42 U.S.C. § 1983 that directly conflicts with the precedent set by this Court, and because the Sixth Circuit misconstrued this Court's decision in *Board of County Commissioners v. Brown*, 520 U.S. ___, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). Furthermore, this case presents the Court with the opportunity to reexamine the doctrine of *respondeat superior* in the context of § 1983 municipal liability.

I. The Sixth Circuit's Decision Creates a Standard for Municipal Liability under 42 U.S.C. § 1983 that Directly Conflicts with the Rule of Law Expressed by Previous Decisions of this Court

A. The General Standard for § 1983 Municipal Liability under *Monell and Pembaur.*

In the landmark case of *Monell v. New York City Dept. of Social Serv's*, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 2035-36, 56 L. Ed. 2d 611, 635-36 (1978), this Court, for the first time, authorized the imposition of liability under 42 U.S.C. § 1983 against a municipality, where a violation of federally protected rights resulted from either a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or "a 'custom or usage' with the force of law." *Id.* at 690, 98 S. Ct. at 2035-36, 56 L. Ed. 2d at 635-36. However, this Court specified that "a municipality cannot be held liable *solely*

because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.*

Instead, *Monell* permitted § 1983 liability against a municipality only where the "execution of a government's policy or custom . . . inflicts the injury." *Id.* at 694, 98 S. Ct. at 2037, 56 L. Ed. 2d at 638. Liability against a municipality under § 1983 requires: (1) proof of "conduct properly attributable to the municipality," (2) proof that the municipal action constitutes "deliberate conduct," and (3) proof of "a direct causal link between the municipal action and the deprivation of federal rights." *Brown*, 520 U.S. at ___, 117 S. Ct. at 1388, 137 L. Ed. 2d at 639.

Following its decision in *Monell*, this Court addressed § 1983 municipal liability primarily in two different types of cases: (1) cases where the municipal action *itself* violates federal law or directs an employee to do so, and (2) cases where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so.

1. Cases Where the Municipal Action *Itself* Violates Federal Law

This Court has held that the three requirements necessary for municipal § 1983 liability are automatically satisfied where the municipal action *itself* violates federal law or directs an employee to do so. *Pembaur v. Cincinnati*, 475 U.S. 469, 479-81, 106 S. Ct. 1292, 89 L. Ed. 2d 452, 463-64 (1986). In *Pembaur*, a county prosecutor directed police officers to serve capiases by forcibly entering a physician's medical clinic. *Id.* at 472, 106 S. Ct. at 1294, 89

L. Ed. at 458. The district court dismissed the physician's § 1983 claim against the county, and the Sixth Circuit affirmed that dismissal. *Id.* at 476-77, 106 S. Ct. at 1296, 89 L. Ed. at 460-61. After granting certiorari, this Court reversed, reasoning that the "Prosecutor made a considered decision . . . [and] [t]hat decision directly caused the violation of petitioner's Fourth Amendment rights." *Id.* at 484, 106 S. Ct. 1300-01, 89 L. Ed. 2d at 465.

In *Brown*, this Court clarified *Pembaur*, noting that § 1983 municipal liability is appropriate where "a particular municipal action *itself* violates federal law or directs an employee to do so." *Brown*, 520 U.S. at ___, 117 S. Ct. at 1388, 137 L. Ed. 2d at 639. The reason for this is clear: where a municipal decision *itself* constitutes a violation of a federally protected right, the three requirements necessary for municipal § 1983 liability are automatically satisfied.

> [P]roof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably. . . . [and] that the municipal action was the moving force behind the injury of which the plaintiff complains.

Id. at ___, 117 S. Ct. at 1389, 137 L. Ed. 2d at 640.

2. Cases Where a Plaintiff Claims that the Municipality Has Not Directly Inflicted an Injury, But Nonetheless Has Caused an Employee to Do So

"Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has

caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Brown*, 520 U.S. at ___, 117 S. Ct. at 1389, 137 L. Ed. 2d at 640. In other words, in cases where the municipal action is facially lawful, a plaintiff must independently satisfy the three requirements necessary for municipal liability under § 1983.

Identifying a policy or custom employed by the municipality is generally the most direct and simplest manner of establishing these three requirements. As this Court noted in *Brown*, proof of a custom or policy *alone* may satisfy each of the three elements necessary for § 1983 liability against a municipality.

Proof of the custom or policy establishes the "conduct properly attributable to the municipality."

> Locating a "policy" ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality.

Brown, 520 U.S. at ___, 117 S. Ct. at 1388, 137 L. Ed. 2d at 639. Additionally, identification of a custom or policy often provides proof that the municipality acted with "deliberate conduct."

> If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees

> may establish the conscious disregard for the consequences of their action – the "deliberate indifference" – necessary to trigger municipal liability.

Brown, 520 U.S. at ___, 117 S. Ct. at 1390, 137 L. Ed. 2d at 641. Finally, a custom or policy often provides "a direct causal link between the municipal action and the deprivation of federal rights." *Id.* at ___, 117 S. Ct. at 1385, 137 L. Ed. 2d at 639.

> In addition, the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the "moving force" behind the plaintiff's injury.

Brown, 520 U.S. at ___, 117 S. Ct. at 1390, 137 L. Ed. 2d at 641-42.

B. The Rule of Law Expressed in *Brown*

In *Brown*, the plaintiff had been severely injured when Reserve Deputy Sheriff Burns used excessive force while arresting her. *Brown*, 520 U.S. at ___, 117 S. Ct. at 1387, 137 L. Ed. 2d at 637. During the trial on her § 1983 claim, Brown offered evidence that the county sheriff failed to adequately review Burns' background, and this failure provided the basis for § 1983 liability against the county. *Id.* This Court granted certiorari in *Brown* to decide whether "the county was properly held liable for respondent's injuries based on Sheriff Moore's single decision to hire Burns." *Id.* at ___, 117 S. Ct. at 1387, 137 L. Ed. 2d at 638.

Brown presented a unique situation, because, unlike *Pembaur*, the government action *itself* was not unconstitutional,[4] and unlike *Canton*, no custom or policy had been identified.[5] Instead, Brown claimed that "a single facially lawful hiring decision . . . launch[ed] a series of events that ultimately cause[d] a violation of federal rights." *Id.* at ___, 117 S. Ct. at 1389, 137 L. Ed. 2d at 640; *see Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989) (stating that inadequate training policy may satisfy deliberate indifference necessary for municipal § 1983 liability).

Initially, this Court expressed serious concern that the lack of a custom or practice would essentially impose a *respondeat superior* standard on the municipality.

> Where a claim of municipal liability rests on a single decision, not itself representing a violation of federal law and not directing such a violation, the danger that a municipality will be held liable without fault is high. Because the single decision necessarily governs a single case, there can be no notice to the municipal decisionmaker, based on previous violations of federally protected rights, that his approach is inadequate.

Id. at ___, 117 S. Ct. at 1390, 137 L. Ed. 2d at 642. According to *Brown*, a lack of notice to the municipality that

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[4] "Sheriff Moore's hiring decision was itself legal, and Sheriff Moore did not authorize Burns to use excessive force." *Brown*, 520 U.S. at ___, 117 S. Ct. at 1389, 137 L. Ed. 2d at 640.

[5] "Respondent does not claim that she can identify any pattern of injuries linked to Sheriff Moore's hiring practices. Indeed, respondent does not contend that Sheriff Moore's hiring practices are generally defective." *Brown*, 520 U.S. at ___, 117 S. Ct. at 1390, 137 L. Ed. 2d at 642.

constitutional violations are occurring or are likely to occur normally will preclude a finding that the municipality acted with the requisite degree of culpability – the "conscious disregard" – necessary for § 1983 liability.

In spite of its concerns, however, this Court did not completely foreclose the possibility that a "single decision, not itself representing a violation of federal law and not directing such a violation," could form the basis of § 1983 liability. *Id.* at ___, 117 S. Ct. at 1390, 137 L. Ed. 2d at 642. Instead, this Court created a rigorous standard that would guarantee that the three requirements necessary for municipal § 1983 liability had been satisfied. This Court emphasized that conscious disregard or deliberate indifference could only be established in cases involving a single decision where the municipal decisionmaker possessed information that would lead a reasonable person to conclude that the *plainly obvious* consequences of that decision would be the deprivation of federally protected rights. *Id.* at ___, 117 S. Ct. at 1391, 137 L. Ed. 2d at 643.

Where the single decision is a decision to hire, this Court stated:

> Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the *plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right* can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."

Id. at ___, 117 S. Ct. at 1392, 137 L. Ed. 2d at 644 (emphasis added). In the context of the particular facts presented in *Brown*, this Court stated that deliberate indifference would require "a finding that *this* officer was highly

likely to inflict the *particular* injury suffered by the plaintiff." *Id.*

C. This Court Unequivocally Limited Application of the Rule of Law Expressed in *Brown* to Cases Where no Policy or Custom Has Been Identified.

Because the rule of law expressed in *Brown* is a strict standard, designed to guarantee that the three requirements necessary for municipal § 1983 liability have been satisfied in cases involving a single, facially lawful decision, application of that stringent standard is unnecessary and inappropriate in a case involving a custom or policy. Indeed, this Court was careful to limit its holding in *Brown* to cases where "municipal liability rests on a single decision, not itself representing a violation of federal law and not directing such a violation." *Brown*, 520 U.S. at ___, 117 S. Ct. at 1390, 137 L. Ed. 2d at 642.

Unfortunately, the Sixth Circuit disregarded this limitation. In its recitation of *Brown*, the Court of Appeals stated:

> The district court and the United States Court of Appeals for the Fifth Circuit agreed that Bryan County was properly found liable under § 1983 based on Sheriff Moore's decision to hire [the officer]," [sic] since the jury had determined that "*the 'hiring policy' and the 'training policy'* of Bryan County 'in the case . . . ' were *each* 'so inadequate as to amount to deliberate indifference to the constitutional needs of [the plaintiff].' " The Supreme Court, however, reversed.

Jefferson County, et al. v. Lindsay, No. 96-5840, Slip Op. (6th Cir. 9/29/97) at Pet. App. 7-8. The Sixth Circuit's opinion thus creates the incorrect impression that the Fifth Circuit and this Court based their decisions on the "training policy" employed by Bryan County.

However, a complete reading of this Court's opinion reveals the Sixth Circuit's error.

> The [C]ourt [of Appeals] addressed only those points that it thought merited review; *it did not address the jury's determination of county liability based on inadequate training of Burns, **nor do we**.*

Brown, 520 U.S. at ___, 117 S. Ct. at 1387, 137 L. Ed. 2d at 638 (citations omitted) (emphasis added).

Indeed, this Court has repeatedly distinguished cases involving a single decision from cases involving a policy or custom. In cases involving a single decision, this Court noted that culpability and causation would be difficult to prove.

> Where a claim of municipal liability rests on a single decision, not itself representing a violation of federal law and not directing such a violation, the danger that a municipality will be held liable without fault is high. Because the decision necessarily governs a single case, there can be no notice to the municipal decisionmaker, based on previous violations of federally protected rights, that his approach is inadequate. Nor will it be readily apparent that the municipality's action caused the injury in question, because the plaintiff can point to no other incident tending to make it more likely that the

> plaintiff's own injury flows from the municipality's action, rather than from some other intervening cause.

Id. at ___, 117 S. Ct. at 1390, 137 L. Ed. 2d at 642. However, in cases involving a policy or custom, conscious indifference may be readily apparent.

> If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action – the "deliberate indifference" – necessary to trigger municipal liability.

Id. at ___, 117 S. Ct. at 1390, 137 L. Ed. 2d at 641. Furthermore, identification of a policy or custom may provide proof necessary to establish causation.

> In addition, the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the "moving force" behind the plaintiff's injury.

Id. at ___, 117 S. Ct. at 1390, 137 L. Ed. 2d at 642.

No Court of Appeals to address the issue has applied the strict rule expressed in *Brown* to a case involving a

policy or custom.[6] *See Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997); *Reitz v. County of Bucks*, 125 F.3d 139 (3d Cir. 1997); *S.P. v. City of Takoma Park*, 1998 WL 12547 (4th Cir. 1997); *Southard v. Texas Bd. of Criminal Justice*, 114 F.3d 539 (5th Cir. 1997); *Robles v. Fort Wayne*, 113 F.3d 732 (7th Cir. 1997); *Haberthur v. Raymore*, 119 F.3d 720 (8th Cir. 1997); *Plumeau v. School District No. 40 County of Yamhill*, 130 F.3d 432 (9th Cir. 1997); *J.B. v. Washington County*, 127 F.3d 919 (10th Cir. 1997); *Wyke v. Polk County School Board*, 129 F.3d 560 (11th Cir. 1997). The Sixth Circuit stands alone in its misapplication of this Court's decision in *Brown*.

D. The Sixth Circuit Improperly Applied the Rigorous Test Expressed in *Brown* Because Liability in this Case Was Premised on Two Separate Policies

Unlike the plaintiff in *Brown*, Petitioner presented evidence at trial of two separate but interlocking policies, implemented by Jefferson County, Kentucky, and its jail that provide the basis for § 1983 liability. First, Petitioner offered evidence that the jail's disciplinary policies were

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[6] This is not to say that *Brown* has not been cited as authority for rules that are generally applicable to cases involving § 1983 municipal liability. Certainly other circuits have cited to *Brown*'s clarification of the general rules originally set out in *Monell* and *Pembaur*. However, the specific language relied on by the Sixth Circuit – that culpability by a local governmental body "must depend on a finding that *this* [charged] officer was highly likely to inflict the *particular* injury suffered by the plaintiff" – was limited to cases involving a single, facially lawful decision by *Brown* itself, and has never been applied to a case involving a custom or policy by other Courts of Appeals. *See Lindsay*, Slip Op. at Pet. App. 7-8.

inadequate to deter violations of federally protected rights. The evidence at trial showed that the officer who permitted Pedro Sosa to remain shackled until 1:15 the morning following his arrest – Sgt. Brett O'Loughlin – had four documented instances of inmate abuse in his file, three of which had already occurred before Pedro's incarceration. R. 106 B. O'Loughlin at 2/28/96 TR 195-207; Pet. App. 21-34; *see also* Pet. App. 37-46. These incidents involved unjustifiably applying a choke hold to an inmate, spraying mace on inmates already locked in a cell, packing 21 inmates into a van designed to accommodate 12 on a hot summer day, and taping shut the mouth of an intoxicated inmate who spat at him. *Id.* Jail authorities themselves acknowledged that the last of these violations involved the prisoner's Eighth Amendment rights and would "shock the conscience" if known to the public. Pet. App. 46-47.

The discipline to which O'Loughlin was subjected for his repeated acts of inmate abuse was a mere written reprimand, no more than what one would receive for four tardies. Pet. App. 40, 42, 48.

The second policy identified by Petitioner arose from Jefferson County's contract with the Teamsters Union, which represents the jail's employees. Under that contract, the County agreed to disregard any acts of inmate abuse occurring more than nine months prior to a promotion decision. Pet. App. 44-45. As a result of this policy, O'Loughlin was *promoted* in spite of his propensity for inmate abuse. *Id.* Because of his promotion, O'Loughlin had the authority, as shift supervisor, to determine when Pedro would be freed from his shackles. He exercised

that authority by permitting Pedro to remain shackled for close to four hours in a pool of his own wastes.

In the final paragraph of the *Brown* opinion, this Court summarized its concerns in cases involving a single, facially lawful decision.

> Cases involving constitutional injuries allegedly traceable to an ill-considered hiring decision pose the greatest risk that a municipality will be held liable for an injury that it did not cause. . . . Where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability. As we have recognized in *Monell* and have repeatedly reaffirmed, Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights.

Brown, 520 U.S. at ___, 117 S. Ct. at 1387, 137 L. Ed. 2d at 638. Although these concerns led this Court to determine that the plaintiff's evidence in *Brown* was inadequate to support § 1983 liability against Bryan County, Oklahoma, the evidence offered in this case clearly satisfies this burden.

The jury reasonably inferred from the evidence that deliberate action attributable to Jefferson County directly caused a deprivation of Pedro Sosa's federal constitutional rights. The evidence at trial established that the jail completely failed to implement adequate disciplinary procedures and that the county agreed to disregard acts of inmate abuse occurring more than nine months prior to any promotion decision. The jury reasonably inferred

that the continued adherence to these two policies constituted conscious indifference on the part of Jefferson County and its jail, and that this conscious indifference was the moving force behind the deprivation of Pedro Sosa's federally protected rights.

II. Even If the Test Expressed in *Brown* Governs This Case, the Sixth Circuit Misconstrued That Test.

In *Brown*, this Court expressed concern that municipal liability under § 1983 collapses into *respondeat superior* liability where courts fail to apply rigorous standards of culpability and causation. *Brown*, 520 U.S. at ___, 117 S. Ct. at 1394, 137 L. Ed. 2d at 646. The Sixth Circuit misconstrued this test, however.

In the context of an inadequate screening case, *Brown* expressed this rigorous standard necessary for municipal § 1983 liability as requiring that "the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right." *Id.* at ___, 117 S. Ct. at 1392, 137 L. Ed. 2d at 644. In the context of an existing policy or program, this standard might be stated as requiring that "the plainly obvious consequences of the decision to continue to use the policy or program would be the deprivation of a third party's federally protected right."

The evidence produced at trial clearly satisfies this standard. The county's policy of turning a blind eye to disciplinary violations on the part of prison personnel, combined with the jail's policy of not considering disciplinary matters occurring more than nine months before a promotion decision, produced a consistent track record of

inmate abuse. These policies caused Pedro to be abused at the hands of a corrections officer who regularly abused inmates. Unlike *Brown*, where the county sheriffs' hiring decision was, at most, a negligent act, the management of the Jefferson County Jail – up to and including the Chief of Corrections – had specific knowledge of O'Loughlin's prior acts of inmate abuse. Pet. App. 21-34. The county's and its jail's continued adherence to two policies that had proven inadequate to prevent such violations satisfies the standard set forth in *Brown*.

Unfortunately, the Sixth Circuit misapplied this standard by selectively emphasizing the terms "this" and "particular" used in this Court's opinion, without regard to the context in which those terms were used.

> Because the evidence presented by Sosa did not adequately present a *direct causal link* between the local government bodies' purported custom of tolerating inmate abuse and disrespect for homosexuals by *these* officers, and the *particular* injuries suffered by Sosa, the verdicts against them do not withstand appellate scrutiny.

Lindsay, Slip. Op. at Pet. App. 11 (emphasis in original). While the Sixth Circuit accurately quotes from this Court's decision in *Brown*, the conclusions that the court draws from that quotation are misguided. In the context of the larger argument, this Court's emphasis of the terms "this" and "particular" was simply to demonstrate that the requisite degree of culpability was not negligence or even gross negligence, but rather, conscious indifference. Conscious indifference, in turn, is established by proof that the municipality made a deliberate decision in the face of facts that would lead a reasonable policymaker to

conclude that a deprivation of federally protected rights would be the plainly obvious consequence of its decision.

What is plainly obvious, however, depends on the particular facts of each case. For example, in *Brown*, this Court determined that Officer Burns' prior record of minor traffic violations and a single altercation did not make his use of excessive force a plainly obvious consequence of the sheriff's decision to hire Burns. *Brown*, 520 U.S. at___, 117 S. Ct. at 1394, 137 L. Ed. 2d at 646. Had Officer Burns used excessive force in the line of duty on three separate occasions, however, a reasonable person could conclude that his use of excessive force in the future would be plainly obvious. Contrary to the Sixth Circuit's reasoning, this Court never implied that conscious disregard required proof of the *exact* same offense.

By focusing on the phrase "particular injury," the Sixth Circuit would apparently reject § 1983 liability against Jefferson County without proof that Officer O'Loughlin had previously shackled an inmate to a bench and forced him to remain in a pool of his own excrement. The standard required by the Sixth Circuit would permit municipalities to avoid liability merely by differentiating the manner in which excessive force was applied or, in this case, cruel and unusual punishment was imposed. While it is obvious that this Court did not intend to establish such a rule in *Brown*, that is precisely how the Sixth Circuit has applied *Brown* in this case.

The Sixth Circuit compounded its misunderstanding of the rule of law expressed in *Brown* by misconstruing the nature of the evidence in this case. The Sixth Circuit's reasoning implies that the causal link between prior derogatory remarks regarding homosexuals and Pedro's

eventual abuse was too tentative to establish conscious indifference on the part of the county. At trial, however, the evidence focused not so much on prior comments, but rather, on prior actions. Prior remarks notwithstanding, O'Loughlin's regular pattern of inmate abuse should have made it "plainly obvious" to jail and county officials that O'Loughlin would abuse inmates in the future.

The standard for municipal § 1983 liability formulated by the Sixth Circuit in this case is at odds with *Brown* and results in a standard that is functionally impossible to satisfy. Although *Brown* does set forth a rigorous standard for municipal § 1983 liability, that standard requires only that cruel and unusual punishment be the obvious consequence of a municipal decision, not that a *particular type* of cruel and unusual punishment be the obvious consequence. The Sixth Circuit compounded its error by misunderstanding the nature of the evidence in this case and its application to *Brown*.

III. This Case Provides the Court the Opportunity to Reexamine the Doctrine of *Respondeat Superior* in the Context of § 1983 Municipal Liability.

In his dissent in *Brown*, Justice Breyer, with whom Justices Stevens and Ginsburg joined, expressed serious concern that the prohibition against *respondeat superior* liability, where liability against a municipality is sought under § 1983, may be antiquated and in need of reconsideration by this Court. *Brown*, 520 U.S. at ___, 117 S. Ct. at 1401, 137 L. Ed. 2d at 656. (Breyer, J., dissenting). Among the reasons that Justice Breyer gave for his concern was the fact that modern statutory enactments authorize indemnification of employees found liable

under § 1983 and render moot this Court's prohibition against *respondeat superior* in such cases. *Id.* at ___, 117 S. Ct. at 1404, 137 L. Ed. 2d at 660. In addition to the states which Justice Breyer identified,[7] Kentucky also has enacted a statute, which permits indemnification of municipal employees for judgments or settlements arising out of the scope of employment. Ky. Rev. Stat. Ann. § 65.2005 (1997).

Furthermore, Justice Breyer noted that, since its creation in *Monell*, this Court has had to redefine the law of municipal liability time and again. *Id.* at ___, 117 S. Ct. at 1403-04, 137 L. Ed. 2d at 658-59. Justice Breyer predicted that this constant adjustment to a body of law of such importance would result in serious confusion among lower courts and practitioners. *Id.* This case represents the fulfillment of Justice Breyer's predictions. The Sixth Circuit's obvious misapplication of *Brown* indicates that this body of law requires clarification. This case presents an appropriate vehicle for this Court to provide the clarification necessary for uniform application of municipal liability under § 1983 among lower courts.

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[7] Justice Breyer identified the following state statutes: Conn. Gen. Stat. § 7-465 (1997); Idaho Code § 6-903 (1990); Ill. Comp. Stat., ch. 745, § 10/2-302 (1994); Kan. Stat. Ann. § 75-6109 (1989); Minn. Stat. § 466.07 (1994); Mont. Code Ann. § 2-9-305 (1994); Nev. Rev. Stat. § 41.0349 (1989); N.H. Rev. Stat. Ann. § 29-A:2 (1988); N.D. Cent. Code § 32-12.1-04(4) (Supp. 1993); Okla. Stat., Tit. 51, § 162 (Supp. 1995); 42 Pa. Cons. Stat. § 8548 (1982); S.D. Codified Laws § 3-19-1 (1994); Utah Code Ann. § 63-30-36 (1993); W. Va. Code § 29-112A-11 (1992); Wis. Stat. § 895.46 (1993-1994). *Brown*, 520 U.S. at ___, 117 S. Ct. at 1404, 137 L. Ed. 2d at 660.

CONCLUSION

The Sixth Circuit's decision in *Jefferson County, et al. v. Lindsay*, No. 96-5840, Slip. Op. (6th Cir. 9/29/97), misapplies the precedent which this Court has established in the context of municipal liability under 42 U.S.C. § 1983. Furthermore, the Sixth Circuit misconstrued the rule of law expressed in *Brown* and confused the evidence in this case and its application to *Brown*. Finally, this case presents the Court with an opportunity to reexamine the doctrine of *respondeat superior* in the context of municipal liability under § 1983. For the foregoing reasons, Petitioner respectfully requests this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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Dated: Monday, March 2, 1998

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 96-5840

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEFFERSON COUNTY, KENTUCKY, et al.,	)	
Defendants-Appellants,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY
v.	)	
COLIN LINDSAY, Executor of the Estate of Pedro Sosa, deceased,	)	
Plaintiff-Appellee.	)	(Filed Sep. 20, 1997)

BEFORE: KRUPANSKY, SUHRHEINRICH, Circuit Judges, and ROSEN, District Judge. *

PER CURIAM. Defendants, Jefferson County, Kentucky ("the County"), its department of corrections ("the Department"), and three police officers, have appealed from a jury verdict finding each of them liable for the cruel and unusual punishment of Pedro Sosa ("Sosa"). Because Defendants have appealed from a jury verdict in Sosa's favor, this court must regard the record in the light most favorable to him. *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979).

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*The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

Sosa, now deceased due to independent complications arising from Acquired Immune Deficiency Syndrome ("AIDS"), was a native Puerto Rican and self-described homosexual who had lived on the mainland of the United States for three years at the time of the subject incident. On September 1, 1994, Sosa became involved in an altercation as he was leaving a Louisville club called "Teddy Bears," where he had had a few drinks. Officer Allen Bybee ("Bybee") promptly arrived at the scene. After inquiries, Bybee directed Sosa into his cruiser, but permitted the other participant in the scuffle to depart. Bybee then arrested Sosa for alcohol intoxication, but allegedly failed to explain the charge to him.

At approximately 6:30 P.M., after the police had fingerprinted and photographed Sosa, he purportedly demanded to know the reason for his being taken into custody and insisted upon making a phone call. Assuming that Sosa had already been fully appraised of any charges against him, a group of three officers removed Sosa's pants, socks, and shoes, and escorted him to a solitary confinement cell. O. Joseph Payne ("Payne"), the acting chief of the jail, later explained that homosexuals are often placed in confinement for their own protection.

As a result of his AIDS, Sosa suffered persistent diarrhea which required access to appropriate toilet facilities that were not available in solitary confinement cells. In an effort to alert his jailers to his special needs, which became more urgent during the first three hours of his confinement, Sosa resorted to the accepted prisoner practice of repeatedly beating upon the door of his cell. Instead of permitting Sosa access to a lavatory, his jailers

threatened to shackle him if he continued the disturbance.

Sosa continued the annoyance. In response, three different officers entered Sosa's cell at 9:15 P.M., chained his wrists behind his back, and fastened the chain to his ankles – ostensibly to prevent "self-abuse." They escorted him to a second cell which had a sink and toilet, and shackled him to a bench, thereby denying him the use of the facilities. Eventually, he relieved his bowel movement into his undergarments.

At approximately 1:30 A.M., two officers unchained Sosa and escorted him to the showers, where after he was instructed to disrobe he collapsed. While he was huddled on the ground, an officer kicked Sosa.

The next morning, the Department released Sosa on his own recognizance, and he went to the home of his friend Donna Jackson ("Jackson"). Jackson observed "burn" marks around his wrists and his ankles. She also witnessed a rash on his buttocks. Sosa sought medical treatment for his rash, which caused him constant pain for several weeks. Other than his rash, abrasions, and apparent mental anguish, Sosa evidenced no bruises on his hands, feet, or other body parts.

Sosa filed a complaint pursuant to 42 U.S.C. § 1983, alleging that the County, the Department, and seven police officers had subjected him to an unreasonable strip-search. beating, and embarrassment in violation of the Fourth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. At the conclusion of discovery, Defendants moved for summary judgment, pursuant to Fed.R.Civ.P. 56, alleging that various written

practices and procedures of the Department clearly demonstrated that it maintained no policy which could expose it to liability. The district court denied the motion, noting that genuine issues of material fact existed regarding the custom and practice of the Department. A jury trial ensued.

At the conclusion of the trial, and subsequent to observing that the answers to specific interrogatories were inconclusive and that the jury had failed to determine if his Eighth Amendment rights had been violated, Sosa moved for a mistrial and requested a new trial pursuant to Fed.R.Civ.P. 59. Although the court initially denied this motion, upon reconsideration it declared a mistrial and ordered a second trial to determine the existence of Eighth Amendment violations, if any.

At the conclusion of the second trial, the jury unanimously concluded that Payne, who was not at the scene, and the three officers who had allegedly strip-searched Sosa were not liable for violating his Eighth and Fourteenth Amendment rights. The remaining Defendants – the County, the Department, and the three officers allegedly responsible for shackling Sosa and denying him the bathroom facilities – were adjudged liable. The jury awarded compensatory damages in the amounts of $500,000 against the County, $500,000 against the Department, and $10,000 against each of the officers, for an aggregate of $1,030,000. It also returned a verdict for punitive damages in the amount of $50,000 against each of the three individual defendants, for a total of $1,180,000. After the court denied Defendants' motion to remit the damages levied against the County and the

Department, all non-prevailing defendants timely appealed.

Defendants have charged that: (1) the district court erroneously granted Sosa a new trial because of an inconsistent jury verdict; (2) the district court's jury instruction addressing cruel and unusual punishment was improper; (3) the district court committed error by denying the County and the Department motions for judgment notwithstanding the verdict, pursuant to Fed.R.Civ.P. 50(b), because Sosa failed to prove that either or both defendants had implemented a policy that disregarded the constitutional rights of homosexuals; (4) the district court erred in permitting the jury to assess damages against both the County and the Department, because they constitute one entity; and (5) the district court improperly denied remittitur.

"By general rule, the granting of a new trial is a matter purely within the discretion of the trial court, and it will not be reviewed. However, where verdicts in the same case are inconsistent on their faces, indicating that the jury was either in a state of confusion or abused its power, a motion to alter or amend a judgment, for new trial, or for relief from the judgment, if timely made, is not discretionary." *Hopkins v. Coen*, 431 F.2d 1055, 1059 (6th Cir. 1970) (citation omitted). Despite this significant deference to the judgment of a trial court, it must nevertheless "attempt to harmonize the answers [a jury gives to special interrogatories], if it is possible under a fair reading of them." *Gallick v. Baltimore and Ohio R.R. Co.*, 372 U.S. 108, 119 (1963). In the instant proceeding, the district court made no effort to explain or reconcile the jury's failure to complete the various general verdict

forms and respond to certain special interrogatories addressing Sosa's Eighth Amendment claim.

Rule 49 of the Federal Rules of Civil Procedure provides, in pertinent part,

> When the answers [to special interrogatories] are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or *may order a new trial.* When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or *shall order a new trial.*

Fed.R.Civ.P. 49(b) (emphases added). The rule clearly supports the district judge's discretion to order a new trial, which judgment is therefore AFFIRMED.

In reviewing the charged erroneous jury instruction in the instant case, this court notes that "[w]hen [jury] instructions are challenged on appeal, [this court] is not to read the instructions word for word in search of an erroneous word or phrase." *O-So Detroit, Inc. v. Home Ins. Co.*, 973 F.2d 498, 502 (6th Cir. 1992). Instead, this court examines the instructions "as a whole." *Hurt v. Coyne Cylinder Co.*, 956 F.2d 1319, 1324 (6th Cir. 1992). Constrained by this legal axiom, Defendants have nonetheless attacked only the second of three elements of the cruel and unusual punishment instruction delivered by the district judge:

> Your verdict must be for Sosa and against the defendants or any of the defendants if the following elements have been proved by a preponderance of the evidence:
>
> (1) Defendants or any of the defendants violated his constitutional right by depriving him of his Eighth Amendment right, that is by subjecting him to prison conditions which resulted in a serious deprivation of a basic human need. It's not enough that the conditions were restricted or even harsh, rather you may find that the conditions were cruel and unusual only if they deprived him of minimal civilized measures of life's necessities. The test is an objective one and in applying it you should be guided by society's contemporary standards of decency. And
>
> (2) *under all circumstances defendants' acts were not reasonably related to maintain order or were excessive beyond necessary, that necessary to maintain order.* and
>
> (3) that as a direct result Sosa was damaged.
>
> If any of these elements have not been proved by a preponderance of the evidence your verdict must be for the defendants.

J.A. at 340 (emphasis added). Defendants have challenged the second prong of the instruction because it allegedly "did not satisfy the subjective component set forth by *Whitley* [*v. Albers*, 475 U.S. 312 (1986),] and did not even capture the subjective component required under the Eighth Amendment, being more like a Fourth Amendment reasonableness standard. . . . " Appellants' Br. at 40.

Although *Whitley* joined Eighth Amendment issues, unlike the instant case it dealt primarily with a prison security measure undertaken to resolve a disturbance that posed "significant risks to the safety of inmates and prison staff." *Whitley*, 475 U.S. at 320. In that context, the Court resolved that a "deliberate indifference standard does not adequately capture the importance of . . . competing obligations" under circumstances where prison administrators are responsible for the safety of its staff, visitors, and inmates. *Id.* Consequently, the Court concluded that the Eighth Amendment right to be free from cruel and unusual punishment "ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.' " *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)).

More applicable to the case at bar, where Sosa desperately needed bathroom access due to his AIDS, is the deliberate indifference standard, applicable to cases involving "serious medical needs." *Caldwell v. Moore*, 968 F.2d 595, 602 (6th Cir. 1992). This test includes both objective and subjective components. *Id.* The objective element of the evaluation is the seriousness of the infraction, followed by a subjective consideration calculated to determine if the Eighth Amendment violation was " 'unnecessary and wanton.' " *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)). The second element of the instruction mirrors the subjective component of the test by directing the jury to determine if the officers' acts exceeded that required to maintain order. The instruction, taken in its entirety, accurately stated existing precedent.

Defendants' third, fourth, and fifth Assignments of error collectively attack the judgment of liability against the County and the Department. In determining if the evidence supported the jury verdict, this court "may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury." *Morelock*, 586 F.2d at 1104. Moreover, "the evidence must be viewed in the light most favorable to the party against whom the [challenge] is made, drawing from that evidence all reasonable inferences in [that party's] favor." *Id.* Counterbalancing this standard of review is the recent Supreme Court decision in *Board of County Comm'rs of Bryan County, OK v. Brown*, 117 S. Ct. 1382 (1997), which applies retroactively to reach this case. *See Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1748 (1995).

Brown determined the section 1983 liability of a governmental unit under circumstances where the plaintiff did not "demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." *Brown*, 117 S. Ct. at 1388. The plaintiff in that case alleged that a police officer had engaged in excessive force during a routine traffic stop, and that the county which employed him was also liable based on its purportedly negligent decision to hire him. *Id.* at 1387.

> Specifically, [the plaintiff] claimed that Sheriff Moore had failed to adequately review [the officer's] background. [The officer] had a record of driving infractions and had pleaded guilty to various driving related and other misdemeanors, including assault and battery, resisting arrest, and public drunkenness.

Id. at 1387. The district court and the United States Court of Appeals for the Fifth Circuit agreed that "Bryan County was properly found liable under § 1983 based on Sheriff Moore's decision to hire [the officer]," since the jury had determined that "the 'hiring policy' and the 'training policy' of Bryan County 'in the case . . . ' were each 'so inadequate as to amount to deliberate indifference to the constitutional needs of [the plaintiff].' " *Id.* The Supreme Court, however, reversed.

In a 5-4 decision, with Justice O'Connor writing for the majority, the Court resolved that

> In layman's terms, inadequate screening of an applicant's record may reflect "indifference" to the applicant's background. For purposes of a legal inquiry into municipal liability under § 1983, however, that is not the relevant "indifference." *A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision.* Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."

Id. at 1392 (emphasis added). The Court further explained that a finding of culpability by the local governmental body "must depend on a finding that *this* [charged] officer was highly likely to inflict the *particular* injury suffered by the plaintiff." *Id.* Although Sheriff Moore's

conduct may have "reflect[ed] indifference to [the officer's] *record*, . . . what is required is deliberate indifference to a plaintiff's constitutional right." *Id.* at 1393.

Brown dictates that an earlier promotion of one of the officers involved in the instant case despite his record of inmate abuse, and the local governmental entities' alleged knowledge of isolated derogatory remarks toward homosexuals imputed no civil liability to either the County or the Department absent proof that the charged officers were "highly likely to inflict the *particular* injury suffered by" Sosa. *Brown*, 117 S. Ct. at 1392. Because the evidence presented by Sosa did not adequately present a *direct causal link* between the local governmental bodies' purported custom of tolerating inmate abuse and disrespect for homosexuals by *these* officers, and the *particular* injuries suffered by Sosa, the verdicts against them do not withstand appellate scrutiny.[1] *See id.* at 1392. Accordingly, the judgments against the County and the Department are REVERSED.[2]

Having concluded that *Brown* mandates that the local governmental bodies in the case at bar are free from liability, this court is confronted with determining if the three remaining involved individual defendants were liable in their official or personal capacities. This court is unable to resolve the issue in the absence of such a finding and the inability of both adversary legal counsel

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[1] Similarly, Sosa failed to develop a nexus between the purported isolated derogatory remarks about homosexuals and the involved officers acting individually or collectively.

[2] The court's resolution obviates the necessity to consider and decide Defendants' remaining charges of error.

to clarify the court's specific inquiries addressing the subject. Since this matter affects the validity of the verdicts against them, the case must be REMANDED so that the trial court can address it.

AFFIRMED in part, REVERSED in part, and REMANDED.

United States District Court

WESTERN DISTRICT OF KENTUCKY

PEDRO SOSA v.	**JUDGMENT IN A CIVIL CASE**
JEFFERSON COUNTY, KENTUCKY, ET AL	CASE NUMBER: 3:95CV-229-J

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the Plaintiff Pedro Sosa, and against the Defendants Jefferson County, Jefferson County Department of Corrections, Brett O'Laughlin, G. S. Colvin and James Angelini in the following amounts:

Jefferson County	$500,000.00
Jefferson County Department of Corrections	$500,000.00
Brett L'Laughlin [sic]	$ 60,000.00
G. S. Colvin	$ 60,000.00
James Angelini	$ 60,000.00

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff, Pedro Sosa have and recover nothing from the Defendants, O. Joseph Payne, Kim Morris, Albert

Elliott and Jeff Lee. This is a final and appealable judgment, and there is no just cause for delay.

/s/ Edward H. Johnstone
EDWARD H. JOHNSTONE,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

_____
Date

ENTERED

MAR 7 1996
JEFFREY A. APPERSON,
CLERK
BY /s/ Illegible
DEPUTY CLERK

/s/ Illegible
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

NO. C-95-229 L-S

PEDRO SOSA — PLAINTIFF

v.

JEFFERSON COUNTY DEPARTMENT
OF CORRECTIONS, ET AL. — DEFENDANTS

ORDER OVERRULING DEFENDANTS' MOTION FOR NEW TRIAL, MOTION TO ALTER OR AMEND JUDGMENT AND MOTION FOR JUDGMENT AS A MATTER OF LAW

* * *

(Tendered Apr. 2, 1996)

(Entered May 21, 1996)

All Defendants herein have moved the Court for a new trial pursuant to Rule 59, Federal Rules of Civil Procedure, and to alter or amend the Judgment entered by this Court on March 7, 1996. Additionally, Defendants Jefferson County, Kentucky, and Jefferson County Department of Corrections have moved the Court for judgment as a matter of law pursuant to Rule 50(b), Federal Rules of Civil Procedure.

The Court having considered the Motions referred to above, and the objections thereto of Plaintiff Pedro Sosa, and the Court being otherwise sufficiently advised,

IT IS ORDERED that the Motions be, and the same are hereby OVERRULED in their entirety.

This is a final and appealable Order, and there is no just cause for delay.

Date: Illegible

/s/ Edward H. Johnstone
Edward H. Johnstone
Senior Judge
United States District Court

Tendered by:

BROWN, TODD & HEYBURN PLLC
Colin H. Lindsay

/s/ Colin H. Lindsay
3200 Providian Center
Louisville, KY 40202
(502) 589-5400
Counsel for Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

PEDRO SOSA,

PLAINTIFF,

v. CASE NUMBER 3:95CV-229-J

JEFFERSON COUNTY DEPARTMENT
OF CORRECTIONS, *et al.*,

DEFENDANTS.

AMENDED JUDGMENT

(Entered May 21, 1996)

On motion of the plaintiff IT IS ORDERED that the Judgment entered by this court on March 7, 1996 [DKT #87] is amended by adding the following provisions:

1. Plaintiff is awarded $19,990.14 in costs and attorney fees pursuant to 42 U.S.C. § 1988.

2. This Judgment shall bear interest from March 7, 1996 until paid at the maximum rate of interest pursuant to 28 U.S.C. § 1961.

3. In all other respects the original Judgment entered on March 7, 1996 shall remain in full force and effect.

This is a final and appealable order.

DATED: May 17, 1997

/s/ Edward H. Johnstone
Edward H. Johnstone,
Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

PEDRO SOSA,

PLAINTIFF,

v. CASE NUMBER 3:95CV-229-J

JEFFERSON COUNTY DEPARTMENT
OF CORRECTIONS, *et al.*,

DEFENDANTS.

ORDER

(Entered May 21, 1996)

The defendants motion for a stay of proceedings to enforce the Judgment entered herein is **sustained** pursuant to Federal Rule of Civil Procedure 62(f) pending disposition of any appeal prosecuted in this manner.

DATED: May 17, 1996

/s/ Edward H. Johnstone
Edward H. Johnstone,
Senior Judge
United States District Court

96-5840

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEFFERSON COUNTY, KENTUCKY, ET AL.,	)	
Defendants-Appellants,	)	ORDER
v.	)	
COLIN LINDSAY, EXECUTOR OF THE ESTATE OF PEDRO SOSA, DECEASED,	)	(Filed Dec. 1, 1997)
Plaintiff-Appellee.	)	

BEFORE: KRUPANSKY and SUHRHEINRICH, Circuit Judges; and ROSEN*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

---

* Hon. Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

PLAINTIFF'S
EXHIBIT
8

MEMORANDUM

JEFFERSON COUNTY

Jefferson County Corrections Department

TO: Officer Brett O'Loughlin

FR: Donna L. Martin, /s/ DLM
Administrative Coordinator/Personnel

DT: February 4, 1991

RE: Disciplinary Action

I am in receipt of the results of your disciplinary hearing dated January 18, 1991.

You are charged with, "Excessive Force on an Inmate," and "Conduct Unbecoming an Officer."

The board has recommended a one (1) day suspension

You will serve your suspension at the direction of your supervisor.

If you wish to grieve this decision, you should do so within seven (7) working days of the receipt of this memo. Contact your union steward for assistance or submit a written grievance to your unit supervisor or captain.

DLM:ccc

Attachments

pc: Major Grace Smith
Captain Sandra Foster
Gwen Nelson
Genon Hensley
Denny Norris
Personnel File

Approved by:

/s/ Richard A. Frey, Jr. Richard A. Frey, Jr., Chief of Corrections	02/05/91 Date
/s/ Illegible Signature of Major/Captain	02/04/91 Date
/s/ Brett O'Loughlin Employee's Signature	3/ 4/91 Date

App. 23

PLAINTIFF'S
EXHIBIT
9

EMPLOYEE'S NAME: O'Loughlin Brett DATE: 24 January 1995

SECTION: HOJ Security Platoon D EMPLOYEE TITLE: Sergeant

You are being provided this notice of violation of the following departmental regulation(s):

1) Conduct unbecoming of a supervisor

2) _____

A brief description of the violation (s) is as follows:

On 24 January 1995 you were involved in an incident of restraining Inmate Michael Malone in which during this incident you used smoe [sic] very poor judgment. Inmate Malone was spitting at staff, and you chose to place a piece of tape on his mouth for a brief period of time versus using a means of prevention that would have been more exceptable [sic] i.e. a surgical mask, and would not shock the conscience of the general public. As a supervisor you are expected to set the example for your subordinates, and to use better judgment in your decision making process. Actions of this nature cannot and will not be allowed. Any further actions of this nature will constitute grounds for further and more severe discpilinary [sic], as this could be construed as violation of the 8th amendment on cruel and unusual punishment.

****

I am recommending the following action:

Verbal Warning

/s/ Lt. B. Green/460
Supervisor's Signature

****

_ I desire an Administrative Disciplinary Hearing.

X I do NOT desire an Administrative Disciplinary Hearing.

/s/ Sgt. Brett O'Loughlin 446
Employee's Signature

PLAINTIFF'S
EXHIBIT
12

EXTRAORDINARY INCIDENT REPORT

	Adams, Kevin
Type of Incident	Name: Last, First, Middle

B	M		7-14-65
Race	Sex	Age	Date of Birth

Time	Day	Date	Floor	Walk	Dorm	Cell No.

Place of Incident: Hall of Justice, 6th floor, hallway outside door #7

Disciplinary Charges: None

Criminal Charges Pending: Rape 1, Sodomy 1, Robb 1, Crim Misch PFO I

Staff Involved: OFC Brett O'Loughlin, OFC Ernest Jackson, Sgt Wendy Harper

Non-Staff Involved: _____

Incident Description: While patroling by Dorm # Two I heard a disturbance in the hallway near the control room. I ran in that direction and in the hallway inmate Adams, Kevin and OFC Brett O'Loughlin was having a heated discussion. When I got into the area OFC Ernest Jackson, Sgt Harper were between OFC O'Loughlin and inmate Adams, Kevin. Both OFC O'Loughlin was still having words and OFC O'Loughlin placed inmate Adams in a choke hold and placed him against the wall. I told OFC O'Loughlin to release him and to take a walk because inmate Adams, Kevin offered no resistance and I felt OFC

O'Loughlin needed to place some distance between him and inmate

(Continued on Back)

OFC Melvin L. Johnson
Reporting Person's Name (PRINT)

/s/ OFC Melvin L. Johnson 12-18-90
Reporting Person's SIGNATURE Date

Force Used Type: Handcuffs

Restraints Used Type: Handcuffs

Time Restraints Applied: _____ Time Restraints Removed: _____

Restraints Ordered By: Sgt Wendy Harper

Medical Report: See Sgt's Report

_____
Reporting Medical Person's NAME (PRINT)

_____ _____
SIGNATURE DATE

RESTRAINTS CHECK (Time): _____

CHECKED BY (Initials): _____

DESCRIPTION FROM FRONT (Continued): Adams so he could think more clearly OFC O'Loughlin released inmate Adams from the hold and Sgt Harper secured inmate Adams with handcuffs

PLAINTIFF'S
EXHIBIT
13

EXTRAORDINARY INCIDENT REPORT

CONFRONTATION — ADAMS, KEVIN
Type of Incident — Name: Last, First, Middle

B — M — 25 — 7/14/65
Race — Sex — Age — Date of Birth

1900 — TU — 12/18/90 — 5TH — SO 1 — NA — #9
Time — Day — Date — Floor — Walk — Dorm — Cell No.

Place of Incident: HALL OF JUSTICE, 5TH FLOOR OUTSIDE THE CONTROL ROOM AND DOOR #7

Disciplinary Charges: _____

Criminal Charges Pending: RAPE, SODOMY, ROBB, CRIM MISCH AND PFO

Staff Involved: SERGEANT WENDY HARPER, OFFICER BRETT O'LOUHLIN [sic], OFFICER MELVIN JOHNSON OFFICER ERNEST JACKSON, OFFICER BENNIE RICHARD, AND DEBORAH GIBSON.

Non-Staff Involved: INMATE KEVIN ADAMS

Incident Description: ON THE ABOVE DATE AND TIME, I WAS ASSIGNED TO THE FIFTH FLOOR AT APPROXIMATELY 1900 HOURS, I WAS LOCATED IN THE CONTROL ROOM SPEAKING WITH DEBORAH GIBSON. OFFICER ERNEST JACKSON WAS ESCORTING A SET OF VISITS BACK TO THE EAST WING. THROUGH THE GLASS FROM THE CONTROL ROOM I SAW OFFICER ERNEST JACKSON AND INMATE KEVIN ADAMS HAVING WORDS. AT THIS POINT, I STOOD TO SEE WHAT WAS HAPPENING. AS I WALKED TO THE PANEL I

SAWY [sic] OFFICER BRETT O'LOUGHLIN APPROACH AND GRAB INMATE KEVIN ADAMS IN A TYPE OF BEAR HUG AROUND THE SHOULDERS. I TURNED TO GO THROUGH THE CONTROL ROOM DOOR AS I SAW BOTH OFFICER BRETT O'LOUGHLIN AND INMATE KEVIN ADAMS SORT OF BOUNCE OF [sic] THE NORTH WALL AND END UP IN FRONT OF DOOR 7. AS I ARRIVED, I SAW OFFICER BRETT O'LOUGHLIN EXECUTING A TYPE OF CHOKE HOLD ON INMATE KEVIN ADAMS. OFFICER BRETT O'LOUGHLIN WAS TELLING THE INMATE "THAT HE WAS SERIOUS". I PULLED THE OFFICERS ARM OFF OF THE INMATE AND PULLED THE SUBJECT ALONG WITH OFFICER MELVIN JOHNSON AND OFFICER ERNSET [sic] JAKSON [sic] INTO THE NORTH CORNER. OFFICER BRETT O'LOUGHLIN STEPPED BACK. OFFICER BRETT O'LOUGHLIN AGAIN STATED HE WAS SERIOUS TO THE INMATE AND SUDDENLY MOVED TO THE INMATE AND GRABBED HIM AROUND THE CHEST AREA (JUMPSUIT). OFFICER MELVIN JOHNSON AND OFFICER ERNEST JACKSON THEN PULLED

(Continued on Back)

Sgt Wendy Harper
Reporting Person's Name (PRINT)

/s/ Sgt Wendy Harper 12/18/90
Reporting Person's SIGNATURE Date

Force Used Type: JUMPSUIT GRAB AND PULL AND HEAD LOCK

Restraints Used Type: NONE

Time Restraints Applied: NA Time Restraints Removed: _____

Restraints Ordered By: NA

Medical Report: 1930 12-18-90 Altercation c̄ officer not hurt physically no c/o of physical injury just states officer "pushed him"

R. Lilly RN, R. Lilly
Reporting Medical Person's NAME (PRINT)
/s/ R. Lilly RN 12-18-90
SIGNATURE DATE

RESTRAINTS CHECK (Time): _____

CHECKED BY (Initials): _____

DESCRIPTION FROM FRONT (Continued): OFFICER BRETT O'LOUGHLIN OFF THE INMATE AS I SECURED THEINMATE. [sic] ALL OFFICERS INCLUDING MYSELF TOLD OFFICER BRETT O'LOUGHLIN TO RELEASE THE INMATE. INMATE WAS PLACED BACK IN HIS HOUSING AREA. NURSE RON LILLY CHECKED THEINMATE [sic] ANDSTATED [sic] NO INJURY RESULTED

PLAINTIFF'S
EXHIBIT
14

EXTRAORDINARY INCIDENT REPORT

Fight	Adams, Kevin
Type of Incident	Name: Last, First, Middle

B	M		7-14-65
Race	Sex	Age	Date of Birth

1900	Tues	12-18-90	5th	So. 1	#9	N/A
Time	Day	Date	Floor	Walk	Dorm	Cell No.

Place of Incident: 5th Floor outside door 7

Disciplinary Charges: Unknown

Criminal Charges Pending: Rape – Sodomy – Robb 1st, Crim Misch P.F.O. 1

Staff Involved: Sgt Harper, Officer Johnson, Officer Jackson

Non-Staff Involved: Kevin Adams – Dozier McGinni

Incident Description: During a visit to 5th Floor apx 7:00 P.M., observed a scuffle between Kevin Adams & Officer Jackson. Jackson and Adams appeared to be joking verbally w/each other. (Observed from control room w/Sgt. Harper) Very suddenly/abruptly I observed Officer O'Laughlin [sic] grab Kevin Adams around the neck & appeared to be choking him. I observed Sgt. Wendy Harper run to the officer & take his arm fm. around Kevin Adams neck & then Kevin Adams was moved to a corner away fm. Officer O'Laughlin [sic]. Almost immediately I saw Officer O'Laughlin [sic] appear to charge towards Kevin Adams & Sgt. Harper along w/several officers

appeared to pull Officer O'Laughlin [sic] off Kevin Adams. I went fm. [sic] control room to talk w/Kevin

(Continued on Back)

Deborah E.
Deborah E. Gibson
Reporting Person's Name (PRINT)

/s/ Deborah E. Gibson 12-18-90
Reporting Person's SIGNATURE Date

Force Used Type: _____

Restraints Used Type: _____

Time Restraints Applied: _____ Time Restraints Removed: _____

Restraints Ordered By: _____

Medical Report: _____

_____
Reporting Medical Person's NAME (PRINT)

_____ _____
SIGNATURE DATE

RESTRAINTS CHECK (Time): _____

CHECKED BY (Initials): _____

DESCRIPTION FROM FRONT (Continued): Adams after incident appeared to be under control. Kevin stated he was joking around w/officer Jackson & Officer O'Laughlin [sic] thought the incident was serious & intervened. Adams maintains he was just horsing around w/Officer Jackson. /s/ D. Gibson

_____

PLAINTIFF'S
EXHIBIT
14a

DISRUPTIVE — MALONE, MICHAEL
Type of Incident — Name: Last, First, Middle
B — M — 28 — 3/23/66
Race — Sex — Age — Date of Birth

0030 — TUE — 1/25/95 — SIXTH — WEST — 4 — 4B
Time — Day — Date — Floor — Walk — Dorm — Cell No.

Place of Incident: HALL OF JUSTICE SIXTH FLOOR WEST WING DORM FOUR

Disciplinary Charges: CHARGES PENDING

Criminal Charges Pending: ROBB 1, DC

Staff Involved: SGT. BRETT O'LOUGHLIN, OFC. SCOTT WACHOWIAK, OFC. WILLIAM BROWN

Non-Staff Involved: NONE

Incident Description: ON THE ABOVE DATE AND TIME INMATE MICHAEL MALONE WAS BEING EXTREMELY DISRUPTIVE BY YELLING AND KICKING HIS CELL DOOR IN DORM FOUR. INMATE MALONE WAS ASKED SEVERAL TIMES TO STOP BEATING ON THE CELL DOOR BUT REFUSED. INMATE MALONE WAS PLACED IN SECURITY RESTRAINTS PER MY ORDERS. AT APPROXIMATELY 0130 HRS. A GREAT DEAL OF NOISE WAS COMING FROM INMATE MALONES CELL. UPON ENTERING THE CELL INMATE MALONE BEGAN SPITTING AT ME. I ALSO NOTICED AT THIS TIME THAT INMATE MALONES RESTRAINTS WERE RATHER LOOSE, WHEN I AGAIN TRIED TO ENTER INMATE MALONES CELL TO ADJUST HIS

RESTRAINTS HE BEGAN SPITTING. FOR A LACK OF ANYTHING ELSE AVAILABLE TO USE, I LIGHTLY PLACED A SMALL STRIP OF TAPE ACROSS INMATE MALONES MOUTH UNTIL I WAS ABLE TO ADJUST THE RESTRAINTS. ONCE THIS WAS COMPLETED I REMOVED THE TAPE AND EXITED THE CELL. AS I WAS DEPARTING INMATE MALONE APOLOGIZED FOR HIS BEHAVIOR AND THAT HE HAD A NUMBER OF DRUGS IN HIS SYSTEM CAUSING HIM TO ACT THIS WAY. MEDICAL WAS NOTIFIED AND INMATE MALONES RESTRAINTS WERE CHECKED. MEDICAL WAS AGAIN CALLED TO THE FLOOR TO ADMINISTER MEDICATION TO INMATE MALONE. INMATE MALONE FINALLY CALMED DOWN AND WAS REMOVED FROM RESTRAINTS AT 0300 HRS.

SGT. BRETT O'LOUGHLIN
Reporting Person's Name (PRINT)

/s/ Sgt. Brett O'Loughlin 1-25-95
Reporting Person's SIGNATURE Date

PLAINTIFFS
EXHIBIT
17

To: Officer Brett O'Loughlin.

Fr: Sgt. Don McCawley #412
/s/Sgt. Don McCawley #412

Re: Letter of Documentation/Counseling.

Dt: July 09, 1992.

This letter is being submitted as documentation and counseling on your part. On 07/08/92 at 2105 hrs. you returned to the Center from the Hall Of Justice with the move list. By your own admission you had 21 inmates per the move list in Van #0940. This is the smaller of the two vans used by the Center. This van is set up to carry no more than 12 inmates in the rear sections and 1 in the side area.

Due to the weather (heat) this date, the number of inmates to be moved and the area of traffic they were to be moved through, this act was very negligent on your part.

Upon your reciept [sic] of this letter, any similar actions involving you and the transportation of inmates may result in severe disciplinary.

I have read and recieved [sic] a copy of this letter.
/s/ Brett O'Loughlin
Officer Brett O'Loughlin.

CC: Major M. Horton.
Captain L. Najjar.
Sgts. File.
File.

[p. 1] UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

PEDRO SOSA, Plaintiff	)	3:95-CV-229-J
	)	LOUISVILLE, KENTUCKY
VS	)	FEBRUARY 28, 1996
JEFFERSON COUNTY, KENTUCKY, ET AL Defendants	)	9:00 A.M.

Volume 1

TRANSCRIPT OF JURY TRIAL
TAKEN BEFORE THE HONORABLE
EDWARD H JOHNSTONE, SENIOR JUDGE,
UNITED STATES DISTRICT COURT

APPEARANCES

For the Plaintiff: Gregory A. Bolzle
Woodward, Hobson & Fulton
2500 1st National Tower
Louisville, KY 40202
and
Colin H. Lindsay
Brown, Todd & Heyburn
400 W. Market St.
3200 Providian Center
Louisville, KY 40202-3363

For the Defendant: Suzanne Cordery
730 W. Main St.
Suite 300
Louisville, KY 40202

Court Reporter: Jerome F. Roppel, Jr.
238 Federal Bldg.
Paducah, KY 42001

* * *

[p. 183] THE COURT: Next Witness.

The jury comfortable? You want a break?

Ten minute recess.

(Recessed 3:00 p.m. – Reconvened 3:20 p.m., Jury present)

THE COURT: Call our next witness.

MR. LINDSAY: Brent [sic] O'Laughlin [sic].

****

SGT. BRETT O'LAUGHLIN [sic], called by PLAINTIFF, previously sworn:

DIRECT EXAMINATION BY MR. LINDSAY:

Q. State your name for the jury, please?

A. Brett O'Laughlin [sic].

Q. What is your current position and title?

A. I'm a sergeant.

Q. all right. Sergeant for the Jefferson County Department of Corrections, right?

A. Correct.

Q. And that was your position on the night of September 1, 1994, correct?

A. Correct.

* * *

[p. 199] A. That is not correct.

Q. All right.

A. She said I appeared to be.

Q. Okay. Well –

A. There's a distinct difference.

Q. Well, she stated that you appeared to be choking inmate Adams, correct?

A. Correct.

Q. all right, sir. She doesn;t [sic] state in there that you really weren't, it was an optical illusion, she says you appeared to be choking him?

A. Uh huh.

Q. And grabbing him around the neck?

A. That's correct.

Q. All right. In fact, an administrative hearing board found you guilty of conduct unbecoming an officer, using excessive force, violating the rights of inmate Adams, correct?

A. Well, I'm not sure if that is correct.

Q. Let me give you what's been marked as Plaintiff's Exhibit 8, memorandum to you from the administrative coordinator personnel. I didn't look at that closely, I don't know if the word "guilty" is in there, but in that report, the administrative, it reflects that the administrative hearing board found that you did engage in conduct unbecoming an officer and using excessive force.

[p. 200] A. Uh huh.

Q. And recommended that you serve, what was it they recommended you do?

A. A one-day suspension.

Q. One-day suspension. That's what, one day with or without pay?

A. That would be without pay.

Q. All right. Did you go ahead and serve your one-day suspension?

A. I did not need to.

Q. All right. And why didn't you need to?

A. I grieved the disciplinary process and was later absolved of this incident.

Q. You were absolved of it because all four of the people who said you put a choke hold on inmate Adams, they later changed their stories and said, oh, he actually didn't put a choke hold on him, is that correct?

A. That's not correct.

Q. All right. Well, tell us what happen. [sic]

A. In fact, what had happened, Officer Deborah Gibson, your Exhibit 14, her story did not change. Number 13, sergeant's report, did not change. But the officers, the two officers I believe that did file reports did change their stories.

Q. Were you a sergeant at the time or an officer?

A. I was an officer.

[p. 201] Q. All right. So you, you had been promoted, in fact, between the date of that incident and the date of those findings?

A. Uh huh.

Q. And the date of Mr. Sosa's arrest you were promoted to sergeant?

A. Yes.

Q. Placing you in a position of greater authority over inmates and over co-workers, or other employees of the Department, correct?

A. That is correct.

Q. The memorandum that I gave you, I think it's number 8?

A. Right.

Q. Who is that signed by?

A. Chief Richard A. Frey.

Q. Top dog, right?

A. Right.

Q. At the time.

A. And I think that's the signature of Lieutenant Marcus Long. And then my signature followed that.

Q. Now, there was another incident where your behavior was again called into question in July of 1992 where you used a 12 passenger van to move 21 inmates –

A. Uh huh.

Q. – across town in very hot weather, do you recall that?

[p. 202] A. Yes, I do.

Q. And again your supervisors indicated their displeasure with your judgment in that situation, correct?

A. They gave me a letter of documentation.

Q. That is maybe something like a reprimand?

A. Yes.

Q. No punishment associated with it other than the letter itself?

A. It's a, it's a letter of record.

Q. All right. But other than a letter of record nothing happened to you?

A. A strong verbal admonishment and that was it.

Q. All right. July 9, 1992, the date that I have, were you an officer or a sergeant at that point?

A. '92, no, I was an officer.

Q. An officer. So they gave you a promotion to sergeant [sic] took place after that incident as well?

A. That is correct.

Q. In February of 1992, you were, I don't know if "discipline" is the right word, but you were cited for spraying mace on inmates, is that correct, sir?

A. I did not mace the inmates, I maced the floor that they were standing on, yes.

Q. All right.

A. There's a different. [sic]

[p. 203] Q. All right. You sprayed mace on the floor into room that was full of inmates, correct?

A. Yes.

Q. All right. The inmates were on one side of the locked door and you were on the other side of the locked door, correct?

A. That is correct.

Q. And you were in no physical danger and so long as they stayed inside the room and you stayed outside, is that correct?

A. That is correct.

Q. And you sprayed mace into that room, is that correct?

A. Yes, I did.

Q. Have you ever been sprayed with mace?

A. Yes, I have.

Q. All right. Is it pleasant?

A. I wouldn't characterize it as pleasnat, [sic] no.

Q. It's not something you would want to have happen to you?

A. Not on a regular basis, no.

Q. I understand it's not lethal, it's not going to kill you.

A. No, it's not.

Q. But you don't want it to happen to you, do you?

A. No, it's discomfort.

Q. You would not like it if someone sprayed you with mace right now?

[p. 204] A. I would probably not like it.

Q. All right. In fact, your supervisors told you, officer, you really shouldn't have done that, correct?

A. I believe that is what the captain said.

Q. And you stated your own understanding that perhaps you shouldn't have done that?

A. Later on I understood that I should not have.

Q. And again that was February 1992 before your promotion, right?

A. Correct.

Q. What sort of punishment did you receive as a result of this?

A. A letter of reprimand.

Q. Same thing we talked about before, right?

A. That is correct.

Q. All right. What's the purpose of these letters of reprimand, if you know?

A. Documentation, the groundwork for developmental needs, possible, if incidents were to occur again along those same lines it shows that the officer, whoever

he or she may be, has been reprimanded about this before and further disciplinary could or would occur.

Q. Let's be clear about this stuff. Once these incidents are nine months old they can't be taken into account in that way, right?

[p. 205] A. That is incorrect.

Q. All right. You're an officer.

A. Right.

Q. Go back into the prior to '94.

A. Uh huh.

Q. You're an officer, you're up for your promotion to sergeant.

A. All right.

Q. Those can't be taken into account if they're more than nine months old.

A. The letters of documentation don't actually fall within the guidelines of disciplinary.

Q. Okay. Well –

A. There's a little bit of difference.

Q. Sure. That's fine. So if you are disciplined –

A. Correct.

Q. – and the letter of reprimand isn't even considered discipline?

A. It's not formal disciplinary, no.

Q. Let's assume you had been disciplined.

A. Okay.

Q. You are suspended for one day, is that discipline?

A. I wasn't suspended.

Q. I'm asking you is a suspension for one day –

A. Yes, that is discipline.

[p. 206] Q. All right. And if you're up for sergeant nine months and one day later that disciplinary action under the contract that you all have, that disciplinary action cannot be taken into account?

A. I can't say that for sure that cannot be taken into account for further disciplinary actions. As far as promotion I really don't know that.

Q. So if you got, if you got a prior disciplinary action –

A. Okay.

Q. – ten months ago –

A. Right.

Q. – and you've got a problem today, you did something last night your supervisor is not too happy about –

A. Right –

Q. – they can't consider that past more than nine months back, is that what you're saying?

A. That is correct.

Q. All right. And that is according to a contract between the sergeants and officers of the Department represented by the Teamsters and the, and Jefferson County, Kentucky?

A. Right.

Q. Now you continue to serve as sergeant in the Corrections Department even today, correct?

A. Yes, I do.

Q. In addition to the incident that we talked about you were [p. 207] also cited, or again I don't know what the technical word would be in your all's [sic] lingo, but you were cited for violating the constitutional rights of inmates?

A. That is incorrect.

Q. Is it correct that you taped shut the mouth of an inmate because he was spitting?

A. Because he was spitting at me, yes.

Q. Is it true that your supervisor, Sergeant Green –

A. Lieutenant Green.

Q. Lieutenant Green put in writing and said if your conduct were known outside the Department it would shock the conscience of the general public, you recall that?

A. That is not the correct quote, no.

Q. On January, I want to read the Plaintiff's Exhibit 9 which I will hand it to you. In fact, let me just get you a

copy of it. – Well, I've got copies of everything but this. I'm going to hand it to you. You don't have to take my word for it, I'm going to read it to the jury and then I'm going to give it to you.

On 24 January 1995 you were involved in an incident restraining inmate Michael Malone in which during this incident you used some very poor judgment. Inmate Malone was spitting at staff and you chose to place a piece of tape on his mouth for a brief period of time versus using a means of prevention that would be have been more acceptable, i.e., [p. 208] stands for "that is," a surgical mask and would not shock the conscience of the general public. As a supervisor you are expected to set the example for your subordinants [sic] and use better judgment in your decision making process. Action of this nature cannot and will not be allowed. Any further actions of this nature will constitute grounds for further more severe disciplinary – that's all it says is disciplinary – as this could be construed as violation of the Eighth Amendment on cruel and unusual punishment.

Now this is number 9. I'm going to give this to you and ask you if I read that correctly?

A. Yes.

Q. All right. Whose signature is that at the bottom of the page?

A. Lieutenant Barry Green.

Q. All right. And what other signature is down there?

A. My signature.

Q. All right. What's that little, what's it say down next to that little x next to your signature?

A. I do not desire an administrative disciplinary hearing.

Q. All right. That's kind of like appealing that, right?

A. I'm unable to appeal it.

Q. All right. Well, you could have asked for a hearing, correct?

A. Correct.

[p. 209] Q. All right. You had no choice?

A. I have no option.

Q. But they had you check one of those boxes and sign?

A. If, if I checked that I desired administrative disciplinary hearing I'm not going to get one. This is a verbal, an official verbal warning, there is no rebuttal to it.

Q. There's no appeal?

A. There's no appeal.

Q. All right. Verbal warning, that's all you got, right?

A. That is correct.

Q. And within agreement you say that you should have picked a method that would not shock the conscience of the general public, correct?

A. That is what he said.

Q. And it also said that your conduct could be construed as a violation of the Eighth Amendment on cruel and unusual punishment?

A. That could be, that's what he said.

Q. And the only result of this was a verbal warning, correct?

A. That is correct.

Q. And you are still in charge of inmates in the Jefferson County Jail?

A. Yes, I am.

Q. And if there is a problem with one of the officers, one of [p. 210] the officers is doing something to an inmate, the inmate complains, Sergeant Brett O'Laughlin [sic] is going to answer that?

A. That is correct.

Q. All right. The inmate that you put the tape on, was he in shackles already at the time?

A. Yes, we had him restrained. He was apparently under the influence of some sort of drug.

Q. Not alcohol, right?

A. No.

Q. Have you personally used a foam helmet before? I don't mean put it on yourself –

A. Right.

Q. – but you ordered it to be placed on inmates?

A. Certainly.

Q. Did you order it placed on Mr. Sosa?

A. There was no need for it.

Q. You did not?

A. I did not because there was no need.

Q. Of course. Did you do anything that would have prevented him from beating his head against the wall?

A. No, I did not.

Q. By leaving him in the shackles that prevented him from beating his head against the door, right? But it didn't prevent him from beating his head against the wall?

A. It prevented him from beating is [sic] hands and feet on the [p. 211] door.

Q. It prevented him from doing anything to the door?

A. Correct.

Q. He couldn't even knock gently on the door from where he was?

A. That is correct.

Q. Couldn't even put his mouth up against the slit and say, hey, I need to go to the bathroom from where he was, correct?

A. That is correct.

Q. You got an inmate in this cell that's got no toilet, you got no way to communicate other than – let me back up, you look like you're confused. Let's talk about our hold cell in number 3.

A. Okay.

Q. It's got no toilet in it, right?

A. That's correct.

Q. All right. Now you don't think that little drain hole in the middle of the floor, you don't think that's a toilet, do you?

A. Not in a conventional sense. Actually I'm uncertain what its purpose is.

Q. All right. Well, do you expect inmates to use it as a toilet?

A. Do I expect them to?

Q. Do you direct them to?

[p. 212] A. No, I don't direct them to do it, no.

Q. If an inmate says I've got to go to the bathroom you say what's the matter with you, got a drain right there in the middle of the floor?

A. No.

Q. You take them to the bathroom, right?

A. Certainly.

Q. Or you order someone to take them to the bathroom?

A. Well, if I'm there I'll take them up.

Q. All right. How is that inmate going to get your attention to tell you he's got to go to the bathroom?

A. He can call out.

Q. Call out. He's going to yell, right?

A. No. There [sic] a difference between calling and yelling.

Q. Well, are you standing right outside the hold number 3 all the time just waiting for an inmate to say, hey, I've got to go to the bathroom?

A. No.

Q. What kind of things are going on down in the basement of the jail?

A. It could be a myriad of events, certainly.

Q. Doors?

A. Doors opening, doors closing, inmates moving, talking.

Q. Yelling?

A. Sure, some of them yell.

[p. 213] Q. Disturbances, fighting?

A. Occasionally.

Q. Officers talking with each, joining with each other?

A. Occasionally, yet.

Q. And doors slamming?

A. Sure.

Q. Those big metal bar doors sliding?

A. Absolutely.

Q. What's it sound like when you pick those shackles up? Does it sound like somebody's walking down the hall with those things on?

A. Sure.

Q. All of that sort of stuff going on, right?

A. Absolutely.

Q. Now, if I said, come up to the door and I don't have a microphone and I say Sergeant O'Laughlin, I need to go to the restroom, you're not going to hear me, right?

A. Chances are I may not.

Q. Unless you just happen to be standing right outside the door you're not going to hear me, right?

A. Or in that general vicinity.

Q. All right. How – all right, how do inmates go about getting your attention? Are you telling me they all just call gently through the slot?

A. I didn't say call gently.

[p. 214] Q. That doesn't always work, right, unless you're standing –

A. I'm sorry.

Q. All right. Unless you're standing right outside the door it's not going to work?

A. If they call gently?

A. Right.

A. Probability not if they call gently.

Q. If that doesn't work –

A. They can –

Q. – what do they do?

A. They can call not so gently.

Q. All right. They can yell?

A. Sure.

Q. What if yelling doesn't do it?

A. Yelling will do it.

Q. All right. Does anyone ever knock on the door?

A. Knock? Yeah, they knock.

Q. Anyone ever use their hands to bang on the door?

A. Are you wanting me to make the distinction between banging and knocking?

Q. Well, personally –

A. I'm not sure.

Q. I don't know whether there's such a distinction or not, Mr. Sosa testified that he knocked.

A. Uh huh.

[p. 215] Q. The way he phrased it was he knocked on the door, that's the way he says. He indicated he used his knuckles to knock on the door.

A. Right.

Q. You every heard anyone do that in the jail?

A. Sure.

Q. All right. Now they can call through this slot?

A. Right.

Q. They can do something to the door, bang on it, knock on it, strike it, whatever you want to call it.

A. Okay.

Q. All right. Isn't that the accepted way, the normal way of getting the corrections officer's attention to come down there so that inmate can be taken to the bathroom, to a toilet?

A. No.

Q. What other way is there? I mean is there an intercom in that room?

A. No.

Q. Is there a phone?

A. No.

Q. Is there any sort of buzzer that they can ring?

A. Not that I'm aware of.

Q. All right. Is there anything else they can do other than yelling or calling through the slot?

A. If he yelled or called through the slot and say I need to [p. 216] use the restroom –

Q. And they can knock on the door?

A. They can knock on the door.

Q. And they do it all the time, right?

A. Sure.

Q. And in fact it happens so much, that people beat on the door so hard that sometimes you have to come in and have the door fixed and have things done to it, right?

A. Are we talking about the beating or knocking?

Q. Well, I'm just asking you. I mean people beat, knock, strike, I don't care what you call it, on that door.

A. Well, there's a lot of difference.

Q. Well, whatever it is you want to call it, call it one thing –

A. Banging and slamming against the door, sure, to where we have to have maintenance come in and fix the door.

Q. We're starting to talk over the top of each other. Let me make sure you understand my quetion. [sic] I'll try to let you finish your answer.

All I'm asking for the time being is, however you want to characterize it, whether you want to call it knocking or banging or beating I don't care, but contacting the door physically inmates in that hold cell number 3 do it all the time to get the attention of corrections officers, correct?

A. If the yelling doesn't work or the calling out.

[p. 217] Q. Okay. All right. Based on your personal knowledge of what you saw or observed, did Mr. Sosa do anything to disrupt the jail or to cause a threat to himself –

A. Nothing –

Q. – other than what you saw, other than jerking on the shackles, did you see him do anything else?

A. He was unable to, he was restrained.

Q. So in the entire time that you were there from whatever time you first say Mr. Sosa when he was gone, when he was released, that's the only thing you saw him do?

A. Thrashing in the chains and screaming and yelling.

MR. LINDSAY: Those are all the questions I have for you.

* * *

[p. 2-257] UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

PEDRO SOSA, Plaintiff	)	3:95-CV-229-J
	)	LOUISVILLE, KENTUCKY
vs	)	FEBRUARY 29, 1996
JEFFERSON COUNTY, KENTUCKY, ET AL Defendants	)	MARCH 1, 1996

Volume 2

TRANSCRIPT OF JURY TRIAL
TAKEN BEFORE THE HONORABLE
EDWARD H JOHNSTONE,
SENIOR JUDGE, UNITED STATES DISTRICT COURT

APPEARANCES

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[p. 2-258] (Jury present 9:30 a.m.)

MR. LINDSAY: Judge, I'd like to move that Plaintiff's Exhibits 6, 7, 8, 9, 11, 12, 13, 14 and 14 A be admitted.

MS. CORDERY: My only objection is I objected to the personnel records in general previously.

MR. LINDSAY: Thank you.

(Plaintiff's [sic] Exhibits 6, 7, 8, 9, 11, 12, 13, 14 and 14 A admitted)

THE COURT: All right, we have another witness and we're moving right quickly [sic].

MR. BOLZLE: Your Honor, we would call as our next witness, Mr. Joseph Payne.

* * *

ARNOLD JOSEPH PAYNE, JR., called by PLAINTIFF, sworn:

DIRECT EXAMINATION BY MR. BOLZLE:

Q. Sir, could you tell your, tell the jury your full name, please?

[p. 2-259] A. Arnold Joseph Payne, Jr.

Q. Mr. Payne, this lawsuit concerns incidents that occurred in the Jefferson County Jail on September 1 and 2 of 1994. What was your position with the jail at that time?

A. Acting chief.

Q. Now what is the job of chief of the jail?

A. The chief of the jail, of course, works under the Fiscal Court and is selected by the County Judge, and the chief operates the Department of Corrections.

Q. In terms of what goes on in the jail, sir, from day-to-day, from night-to-night, what involvement do you have there?

A. We get –

THE COURT: What did you then [sic].

MR. BOLZLE: Yes sir.

Q. This is in, we're speaking in terms of your position as chief on September 1 and 2, 1994?

A. Yes sir.

Q. What was your responsibility for what went on in the jail on those days?

A. We get, or I got daily reports of what went on inside the jail and then we have a weekly meeting with the three majors, the person in charge of the medical and food service, some other people in the general meeting every week, lasts about an hour to two hours.

Q. Well, to cut to the quick, sir –

[p. 2-260] A. Yes sir.

Q. – as chief of the jail on September 1 and 2, 1994, you were responsible for what went on in that jail good or bad, correct, sir?

A. That's correct.

Q. We used to have a president of the country who was famous for, among other things, having a little thing on the front of his desk that said "The buck stops here." That would be true of the position you occupied on September 1 and 2, 1994 as to what happened in that jail?

A. I don't know if I'd put it exactly that way, but I'm responsible, yes.

Q. Well, would you agree or would you not, sir, that the buck stops at your desk?

A. No, the buck can go on from there, yes sir.

Q. Who would it go to?

A. It goes to the, to the County Judge, the Fiscal Court commissioners.

Q. You recall testifying previously in this case and telling me that the buck stops at your desk?

A. Yes sir.

Q. Now, the main reason for that –

A. Okay.

Q. – is that because as chief of the jail –

A. Yes sir.

[p. 2-261] Q. – you are responsible for promulgating and for enforcing the policies and procedures that govern how the officers treat the people that come into that jail, correct?

A. Yes sir.

Q. And it is your responsibility as the chief, and particularly your responsibility on September 1 and 2, 1994, to make sure that those policies required those officers to give due respect to the legal and constitutional rights of the people that came into that jail, correct, sir?

A. Yes sir.

Q. And it was your responsibility, sir, if those policies and procedures were doing their job, that is they weren't keeping the officers from violating the constitutional rights, to change those policies, correct, sir?

A. I could, yes, I could change those policies. We start that change, yes sir.

Q. Would you agree with me, and I think this is almost a fundamental tenant of business or management of any kind of organization, that the attitude at the top, at the top of the organization affects and reflects the attitudes that run all the way to the bottom of that organization, correct, sir?

A. I would agree with that, yes sir.

Q. And for that reason, for that reason you strictly enforce all of the policies of the Jefferson County Jail that require the officers to respect the constitutional rights of the [p. 2-262] people that come into that jail?

A. Correct.

Q. A policy, you would agree with me, Mr. Payne, is only as good, it is only as strong as the willingness of the people on top, the chief in your case –

A. Uh huh.

Q. – to enforce it?

A. Yes sir.

Q. Now, you need a glass of water?

A. No, I've got –

Q. Take a second.

A. That's all right. Sometime I get coughing here in the last week.

Q. Any time you need a glass of water let me know.

A. Thank you, sir.

Q. You are familiar with the facts of this case, are you not?

A. Yes.

Q. I think you are familiar with it in such detail that you've had an opportunity now to watch on several occasions the videotape of Mr. Sosa being processed through the grill area, correct?

A. Yes sir.

Q. Is it your position, Mr. Payne, that Mr. Sosa, during his incarceration at the Jefferson County Jail on September 1 and 2 of 1994 was handled in a manner that was completely [p. 2-263] consistent in accord with the policies and procedures of the Jefferson County Jail?

A. Yes sir.

Q. It is the policy of the jail, is it not, Mr. Payne, that inmates, if they are searched, be searched by members of their same sex?

MS. CORDERY: Objection, irrelevant.

THE COURT: Overruled.

THE WITNESS: Yes sir.

Q. Let me ask you also, sir, you've seen the videotape of Mr. Sosa being processed. Typically in that process procedure what the person entering the jail is subjected to is a frisk search, correct?

A. Yes sir.

Q. You also remember, though, from that videotape that there is a portion in which Mr. Sosa has his pants open and his underwear is visible, correct?

A. A part of his underwear is visible, yes. I wouldn't call his pants open, but they're –

Q. You would agree with me, would you not, sir, that looking down into the pants of an arrestee, somebody coming into the jail, is not part of that frisk search?

MS. CORDERY: Objection, your Honor.

Q. Let me –

THE COURT: Overrule and it's continuing.

[p. 2-264] Q. Let me repeat my question.

A. Yes sir.

Q. You would agree, would you not, Mr. Payne, that looking down into that inmate's pants in the manner that you see on the videotape, that is not part of the frisk search procedure, is it?

A. It was, I don't think it's part of the procedure, but from what I can remember from that I didn't think the person was purposely looking down his pants, no sir.

Q. Okay. But we can agree that's not part of the frisk search procedure?

A. You have to look at the beltline when you go around in a frisk search, so yes, you do have to look down at what you're doing.

Q. Is opening the pants up part of the frisk search procedure?

A. Opening the pants up? No sir.

Q. Part of what you do as chief, when you were chief on September 1 and 2, 1994 –

A. Yes sir.

Q. – was to insure that the policies and the procedures of the Jefferson County Jail were such that people who were incarcerated in the jail had their basic human needs taken care of?

A. Yes sir.

[p. 2-265] Q. That they had necessary access, for example, to water?

A. Yes sir.

Q. That when they needed a toilet they could have access to one?

A. Yes sir.

Q. There is a cell in the jail that has no toilet in it, correct, Mr. Payne?

A. Yes sir.

Q. Who gets put in there and why?

A. People that are, that become disruptive, there's drunks, people that are drunk, come in intoxicated, they go in there.

Q. Why do you put them in there?

A. Because they may harm themselves or others.

Q. Well, I mean what, I guess what I'm getting at is why do you have a cell without a toilet anyway for any reason?

A. For any reason?

Q. Yes sir.

A. Because the toilet, in my opinion, the toilet coming out from the wall area, if someone falls in that area and against the toilet would hurt them.

Q. Okay. Mr. Payne, you have seen that videotape that you have previously testified, and you have previously testified, have you not, that Mr. Sosa's behavior in that videotape does not indicate he was so intoxicated that putting him in a cell with a toilet would imperil his bodily, would, might resort in [p. 2-266] him falling down, I guess, and banging his head against the toilet?

MS. CORDERY: Objection.

Q. Let me restate my question. The videotape of my client that you have have seen –

A. Yes sir.

Q. – you will agree with me, would you not, sir, that it does not indicate that Mr. Sosa was so intoxicated that he was at risk of falling over and banging his head on a toilet if he was put in a cell with one?

A. No.

MR. CORDERY: Objection.

Q. That's all right. What was your answer, sir? Would you agree or not?

THE COURT: I'm going to let him answer.

MS. CORDERY: I have an objection, please.

THE COURT: Let him answer.

Q. Let me repeat the question again, okay, sir? This is an important question.

A. Yes sir.

Q. You have seen the videotape of Mr. Sosa coming into the jail?

A. Yes sir.

Q. Would you agree with me that the videotape doesn't indicate that Mr. Sosa was so intoxicated that he would be at [p. 2-267] risk of falling down and hurting himself if he was put into a cell with a toilet?

A. No sir, I think the videotape indicates he is intoxicated. Now how ntoxicated [sic] I can't tell.

Q. Let me repeat my question so, it's important that you understand what I'm asking.

A. Okay.

Q. What I'm asking you is you would agree with me that the videotape shows that Mr. Sosa is not so intoxicated that he might hurt himself if you put him in a cell with a toilet? You would agree that the videotape shows he's not so intoxicated that putting him in a cell with a toilet would endanger him?

A. No, I can't do that.

Q. You remember testifying previously in this case, sir, on October 24-25, 1995?

A. Yes sir.

MR. BOLZLE: If I may approach the witness, Your Honor?

THE WITNESS: Sure.

Q. What I'd like to do is read with you, Mr. Payne –

A. Yes sir.

Q. – and I'm going to read beginning with page 224 over to page 225, 224 beginning with line 23. And we were discussing the videotape at this point.

[p. 2-268] A. Yes sir.

Q. At this point, Mr. Payne, you see my client walking in unassisted, standing against the wall unassisted, do you not?

Your answer was?

A. Yes sir.

Q. Then I asked you do you see anything or do you recall anything that you saw in this videotape, having

watched it all the way through, to indicate that my client on this evening was, anyway that was at risk of falling over and banging his head against the toilet because he was so intoxicated?

What was your answer?

A. I wouldn't know that, Well, I wouldn't know that.

Q. I asked you then, well, did you see anything on this videotape to indicate that he would be somebody who would be exposed to that kind of a risk if you put him in a cell with a toilet?

And your answer was, sir?

A. No sir, I don't think the videotape showed that.

Q. Thank you. Was your testimony at that time true then?

A. Yes.

Q. Is it true now?

A. Yes. I'm just talking about when the videotape showed him, the time he leaned over and he had to cross his legs to hold himself up, that's what I thought.

Q. When he crossed his legs?

[p. 2-269] A. I thought that's what you were referring to.

Q. When he crossed his legs did he trip over his foot?

A. No sir, but a lot of people that are intoxicated will cross their legs.

Q. A lot of people that aren't intoxicated will cross their legs?

A. Not that I know, no sir.

Q. You're saying that, an observer of human behavior, Mr. Payne, that people who aren't intoxicated don't cross their legs?

A. I'm sure some people that aren't intoxicated cross their legs.

Q. Sure.

A. But I'm talking about the people coming in jail observe and when you watch people that are intoxicated and not intoxicated.

Q. It's not unusual to see somebody that is not intoxicated crossing their legs, right?

A. They're not intoxicated?

Q. Somebody that is intoxicated crossing their legs?

A. Wait a minute, somebody that is intoxicated –

Q. Yes.

A. – that it's not unusual crossing their legs?

Q. Right.

A. To get their balance sometimes they'll cross.

[p. 2-270] Q. And it's not unusual to see somebody that isn't intoxicated crossing their legs?

A. They a lot of times won't cross their legs to get their balance, no sir.

Q. Do you regard that as unusual to see somebody that is sober crossing their legs?

A. Unusual? I don't know if it's unusual or not.

Q. I mean I could stand here, Mr. Payne, and I could cross my legs, you find that unusual?

A. No sir.

Q. And quite frankly, I'm not too sure I can stand here unassisted like Mr. Sosa did on the videotape –

MS. CORDERY: Your Honor –

Q. – without putting my hands on the podium.

MR. CORDERY: May we approach the bench?

THE COURT: All right. Just move it on, I think.

MS. CORDERY: I didn't understand what you said.

THE COURT: Well, come up here.

(Bench conference)

MS. CORDERY: My objection is that this line of questioning is invading the province of the jury. Mr. Payne was not involved in any decision to put him into any particular cell, so he's basically asking him what he thinks [p. 2-271] which is what the jury should decide.

THE COURT: He has mentioned or he's based some of is [sic] answers on the fact that the fellow crossed his legs, that was an issue in the earlier trial.

MS. CORDERY: But the whole line of questioning about what do you think the videotape shows is

something the jury is supposed to decide, not to bring anybody off the street to say, well, do you think the person was intoxicated? I mean we could ask anybody.

MR. BOLZLE: That's not the question that's been asked. I mean he's testified and he's been impeached.

MS. CORDERY: That's my objection to this whole line of testimony.

MR. BOLZLE: I'm finished with that part.

THE COURT: I overrule.

THE WITNESS: Can I ask you a question.

MS. CORDERY: No. sorry.

(Before the jury)

MS. BOLZLE: Your Honor, I don't have any objection if Mr. Payne wants to talk with his lawyer.

THE WITNESS: Okay.

Q. Are all inmates in the Jefferson County Jail treated equally?

[p. 2-272] A. Yes sir.

Q. Now, we were talking about the policies and procedures in the jail that insure that inmates get access to the things they need to satisfy basic human needs. We've talked about water, we talked about access to a toilet. Now one of the procedures or the customs and practices that you have in place, Mr. Payne, in that jail, and you're aware of it, is that when somebody is in this isolation cell that doesn't have a toilet they bang on the

door to get somebody's attention so they can go out and use the toilet, right?

A. Yes sir.

Q. That is a custom and practice in the jail, correct, sir?

A. Yes sir.

Q. That is not unusual, is it, sir?

A. No sir.

Q. The officers under your supervision are trained to expect that, aren't they, sir?

A. Yes sir. If someone is in that cell and they need the restroom, yes sir.

Q. And that's because you got to knock on the door, you got to pound on the door to get somebody's attention, is that correct, sir?

A. Yes sir.

Q. And depending upon that person's relative need or their desperation you might expect the banging would get a little, [p. 2-273] perhaps, louder, perhaps a little more frantic, wouldn't you, sir? That would only make sense.

A. True.

Q. When you've got to go you've really got to go, right, Mr. Payne?

A. Oh, yes sir.

Q. Particularly when you've been in that cell from 6:30 at night and it's 9:15 and you haven't been to the bathroom yet, wouldn't you say so?

A. Possibly have to go, yes sir.

Q. Have to go pretty bad, don't you think?

A. I don't know. I can't, I can't say, no sir.

Q. Now, despite the fact that it is the custom and practice for inmates to beat on that door when they have to go to the bathroom, that the officers know to expect that, it's true, isn't it, Mr. Payne, that if you beat on that door too hard or too long you risk being shackled to a bench?

A. No. My personal opinion is if you beat on the door they'll come and if you got to go to the restroom to take you to the restroom.

Q. Is is not the custom and the practice of the jail, Mr. Payne, to restrain inmates who beat on the isolation cell doors too hard or too long?

A. Yes sir.

Q. Do you feel a bit of a conundrum there, Mr. Payne, that [p. 2-274] somebody who is beating on the door perhaps too hard and too long becuse they really have to go to the bathroom might get shackled instead of getting let out?

A. No sir.

Q. That has never crossed the mind of the hierarchy of the Jefferson County Jail that that might happen in an instance?

A. No sir, because I expect that if you beat on the door, or knock on the door then someone's going to come and let you, you know, if you have to go the restroom, let you go to the restroom.

Q. If you can express, I think as Officer O'Laughlin said yesterday, if you can articulate, his word, that you have to go to the bathroom, right?

A. I mean I'm assuming you're going to ask that question.

Q. I'm asking you that question. If you can't articulate that you go to the bathroom, that you need to go to the bathroom and you bang on that door they're going to let you out?

A. Most people will say they want to go.

Q. Most people. Some people won't say they have to go and some people have problems with the language, don't they, Mr. Payne?

A. Some people do, yes sir.

Q. And you know for a fact, don't you, Mr. Payne, that my client speaks at best heavy accented English and has a poor [p. 2-275] command of the language, don't you?

A. No sir.

Q. You don't know that?

A. I have never heard him talk, I don't think.

Q. Well, the jury has. Now we talked about people that are intoxicated being put into the cell, the isolation

cell, hold 3, no toilet, because they're so intoxicated because there's a danger they'll trip over and fall over and bang their heads on the toilet?

A. Yes sir.

Q. I assume that's the only concern. We're not worried about them trying to flush their head down the toilet, anything like that, are we?

A. No.

Q. You haven't seen anything like that happen in the jail, have you?

A. Flush their head down the toilet?

Q. Right.

A. I've seen people stick their head in the toilet, yes sir. I've had to pull their head out of the toilet because they're trying to commit suicide.

Q. Okay. Who else gets put in that isolation cell?

A. You mean what kind of other people get put in there?

Q. Yes sir.

A. As I stated before, people that are disruptive, people [p. 2-276] that maybe need, have to have an area by theirselves, intoxicated people.

Q. Now if you don't get put in the isolation cell, Mr. Payne, and this is an area I don't know that we've covered with the jury.

A. Yes sir.

Q. When you come in the jail Mr. Sosa was put in an isolation cell. If he had not been put in an isolation cell where would he have been put?

A. In the main holding cell.

Q. Now as I understand it that is a big cell?

A. Yes sir.

Q. Full of, or having other inmates in it?

A. Yes sir.

Q. Is one reason you put somebody in the isolation cell because they're gay or known to be gay and may be abused if they're put in the main holding cell?

A. That's possible, too, yes sir.

Q. And you would do that if you knew that the person, upon their admission to the jail, was homosexual, would you not?

A. If they admitted that sometimes, and sometimes they request it.

Q. Well, what if you were told that by the arresting police officer or anything of that nature, correct?

A. I think sometimes the arresting police officer doesn't [p. 2-277] know what, sometimes they think they know, I mean it depends, you usually asked the person.

Q. But that is one instance, another instance in which that holding cell would be used or could be used?

A. Yes sir.

Q. And it has nothing whatsoever to do with the intoxication of the person coming into the jail?

A. Now you [sic] talking about going without a bath, without a toilet? I'm sorry.

Q. Yes.

A. Okay. Now, we would put, from my understanding when I used to work down there, we would put the person in one of those other two cells.

Q. The one with the toilet?

A. Yes sir.

Q. What if those other two cells had people in them?

A. Usually, well, if the person couldn't go in the main holding cell?

Q. (nodding in affirmative)

A. Sometimes they would, yeah, sometimes we might have to put them in there, but we wouldn't lock the door, they might stand in the hallway, yeah.

Q. If you have a very slight individual, and I don't know if this is an accurate description, the jury saw Mr. Sosa yesterday –

[p. 2-278] A. Yes sir.

Q. – but a gentleman of that bearing, who is gay, who's known to be homosexual, and the alternative is putting him in one of the isolation cells or in the main holding cell, where there is people who might harm him if they became aware of has [sic] sexual persuasion, what would you do?

A. I'd put him in one of the holding cells.

Q. I want to talk to you now about discipline.

A. Yes sir.

Q. You will agree with me, Mr. Payne, that the environment of the jail is difficult?

A. Yes sir.

Q. And that unless the lines of appropriate behavior are clearly drawn, and I'm speaking here in terms of your officers –

A. Yes sir.

Q. – that human emotion, human nature, the pressure of the jail being what it is and what I think people can understand it, the, that things can get out of hand, correct?

A. How do you – what – how do you mean get out of hand?

Q. Let me ask the question this way.

A. Okay.

Q. You testified the jail's a difficult environment.

A. Yes sir.

Q. It is an environment that can be at times regrettably [p. 2-279] characterized by physical violence.

A. Yes sir.

Q. It is a harsh environment, it is not your living room, it is a place of concrete and steel.

A. Yes sir. I wouldn't say it was harsh, but it's concrete and steel, yes sir.

Q. I would hope that no one in this trial would interpret I or my co-counsel have said to indicate that we expect your officers to be any more than human, but they are human beings and they are subjected to the same stresses and the same difficulties as the rest of us are, are they not?

A. Yes sir.

Q. And in their employment and in the things that they have to confront in their employment they are probably challanged [sic] to maintain their self-restraint more than the average person in the average job, would you agree with that?

A. Yes sir, I'd agree with that.

Q. But it's important that they maintain their self-restraint, is it not Mr. Payne?

Q. That's correct.

Q. And for that reason you, as chief on September 1 and 2, 1994, knew that it was important that clear lines be drawn for your officers identifying what was, what is and what is not appropriate behavior in the environment of the jail.

A. That's correct.

[p. 2-280] Q. And you knew n [sic] your superiors know that it is absolutely essential that when one of those lines is crossed that a clear message be sent to the offending officer that that type of conduct will not be tolerated, correct?

A. That's correct.

Q. Mr. Payne, the jury heard evidence yesterday that from eleven o'clock in the evening until he was released at 1:33 in the morning, Mr. Sosa was in the charge of Sergeant Brett O'Laughlin.

MS. CORDERY: Objection. There's no evidence that he was release at 1:30 in the morning.

Q. His release from the jail, I'm sorry, his release from the holding cell. The jury heard evidence yesterday that Sergeant O'Laughlin has experienced four documented instances in which he has been warned or notified that he has engaged in conduct that might be or is considered abuse of an inmate. Now, my question for you is, and let me back up and say three of those instances occurred, as I understood it, before Mr. Payne was promoted, promoted to the position of sergeant. O'Laughlin, I'm sorry, I'm getting my names confused. Before Sergeant O'Laughlin was promoted to the position of sergeant.

A. Yes.

Q. Why, from that record, was he promoted to the position of sergeant if you are trying to send clear lines and clear messages of what will and what will not be tolerated in the [p. 2-281] jail?

A. When we promote someone we only go back and look at the last nine months.

Q. That's because of a contract, isn't it, sir?

A. Yes sir, it is.

Q. That's because a provision of a contract that governs the employment of the officers in the jail prohibits you from considering, making a decision about promotion an act of inmate abuse that may have occurred nine months and two days prior, correct?

A. That's correct.

Q. Do you, Mr. Payne, have any problem whatsoever with that provision of the contract?

A. Yes sir.

Q. Why is it there if you have a problem with it?

A. It was negotiated in the contract.

Q. And the person, the corporate person that negotiated that contract –

A. Yes sir.

Q. – is Jefferson County, is it not?

A. Jefferson County Fiscal Court, yes sir.

Q. And despite your reservations about that provision, reservations I'm sure you share with others, Jefferson County permits that provision to remain in that contract, do they not?

[p. 2-282] A. They did, yes.

Q. In fact, a contract was signed just this past August, wasn't it, Mr. Payne, with that very provision still in it?

A. Yes sir.

Q. The jury heard yesterday that Officer O'Laughlin engaged in an act which was characterized by a superior

of something that might be considered violation of the Eighth Amendment, prohibition against cruel and unusual punishment, and the evidence showed that he received that letter and the letter of warning was placed in his file. The jury heard also in that supervisor's same comments that the act in question, this Sergeant O'Laughlin's taping an inmate's mouth shut –

A. Yes sir.

Q. – would be considered an act that would shock the conscience of the community. Mr. Payne, explain to this jury, if you would, what you have to do as an officer of the Jefferson County Jail to get more than a letter of warning in your file? Do you have to kill somebody?

A. No sir.

Q. Sergeant O'Laughlin – let me get that out because I think that's important that you see that. This is Plaintiff's Exhibit 9, Mr. Payne.

A. Yes sir.

Q. And it says a brief description of the violation is as follows, and just read along with me, on 24 January 1995 you [p. 2-283] were involved an [sic] incident of restraining inmate Michael Malone in which during this incident you used some very poor judgment. Inmate Malone was spitting at staff and you chose to place a piece of tape on his mouth for a brief period of time versus using a means of prevention that would have been more acceptable, i.e. surgical mask, and would not shock the conscience of the general public. As a supervisor you are expected to set the example for your subordinates and to use better judgments in the your [sic] decision making

process. Actions of this nature cannot and will not be allowed. Any further actions of this nature will constitute grounds for further and more severe discipline action as this could be construde [sic] as violation of the Eighth Amendment on cruel and unusual punishment.

Did I read that correct?

A. Yes sir.

Q. Plaintiff's Exhibit 9 says any further action of this nature will constitute grounds for further and more severe discipline. What are the steps that the jail has for further and more discipline beyond a letter, this letter, a disciplinary action notice? What's the next step? What's the next most harsh –

A. Okay, he received a written warning?

A. Yes sir.

Q. All right. There is, you want me to go through the steps?

[p. 2-284] Q. All I want to know from you, Mr. Payne, is what's worse than that [sic] short of firing?

A. Okay. A letter of instruction, the written warning, verbal warning –

Q. Take your time.

A. Suspension and termination.

Q. Okay. Well, so beyond that –

A. Would be suspension.

Q. – would be suspension and then would be termination?

A. Yes sir.

Q. Despite the three incidences of inmate abuse that were discussed with Sergeant O'Laughlin yesterday and which occurred before the incarceration of Mr. Sosa and which involved a question of whether he placed an inmate in a choke hold, macing inmates who were already behind the door, putting 21 inmates in a 12-person van, in light of that record, why did Sergeant O'Laughlin hold any position of responsibility the night that my client was in your jail?

A. He was a sergeant.

Q. A sergeant promoted under the contract you previously described to this jury?

A. Yes sir.

Q. You said you had problems with the provision of that contract.

A. Yes sir.

[p. 2-285] Q. What are your problems with it, Mr. Payne?

A. It's personal, I personally don't like the provision of only going back nine months on a promotion. That's my personal – I mean the selection process.

Q. I'm trying to measure my words here, but that's because it's crazy, isn't it, Mr. Payne? It's a crazy provision in a contract –

MS. CORDERY: Your Honor –

Q. – that bars you from considering an act of inmate abuse that occurred nine months and one day prior to the date of promotion, it's crazy, isn't it?

A. I would like to be able to consider further back than that, yes sir.

Q. It makes no sense not being able to, doesn't it?

A. But it's in the contract.

Q. It's irresponsible, isn't it, in your opinion, Mr. Payne? It's irresponsible?

A. I don't know whether it's irresponsible, but I would like that opportunity to go back further, but it's –

Q. Well, Mr. Payne, I'm not trying to be unfair to you, sir –

A. Yes sir.

Q. – because I know you're an employee of Jefferson County. In your opinion, sir, that provision of that contract is irresponsible, is it not?

[p. 2-286] A. I don't know if I would say the word "irresponsible," but I don't like it.

Q. Who is it, who is it that is not listening to your opinion about that provision, Jefferson County Fiscal Court, Jefferson County?

A. The Fiscal Court is the people who negotiates the contract.

Q. Yesterday, Mr. Payne, Officer O'Laughlin described himself, Sergeant O'Laughlin described himself in his words for us, described himself as a shining example of the strict and effective enforcement of the jail's

policy prohibiting inmate abuse. Would you agree with that?

A. From what I've seen Sergeant O'Laughlin is fairly strict in that, yes. Fairly strict in it.

Q. Mr. Payne, was there any investigation of the incident we've been trying before this jury now for a day –

A. No.

Q. – in the jail?

A. I don't believe so, no sir.

Q. Was there any discipline meted out?

A. No sir.

MR. BOLZLE: No further questions.

THE WITNESS: Yes sir.

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Supreme Court, U.S.
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No. 97-1431

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

COLIN LINDSAY, Executor of the Estate of Pedro Sosa, Deceased, - - - *Petitioner,*

versus

JEFFERSON COUNTY and JEFFERSON COUNTY DEPARTMENT OF CORRECTIONS, - - - - - *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner filed a Complaint under 42 U.S.C. §1983 in which he alleged his Constitutional rights were violated because he was strip-searched[1] and subjected to cruel and

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[1] On page 4 of his STATEMENT OF THE CASE, Petitioner discusses matters recorded by a Jefferson County Jail videotape which recorded Sosa's demeanor upon his initial entry into the jail, where he was frisk searched and his personal property was taken. Although Petitioner still maintains Sosa was mistreated

(Continued on next page)

unusual punishments while incarcerated in the Jefferson County Jail on a criminal charge of public intoxication.[2] The Jefferson County Jail, located in Louisville, Jefferson County, Kentucky, is a facility maintained by the Jefferson County Department of Corrections, a *de jure* department and division of Jefferson County government, with its powers and duties subject to the approval of the Fiscal Court of Jefferson County.[3]

Petitioner's theory of municipal liability against the County was that the County and Department had a policy or custom of condoning, tacitly approving, or acquiescing in staff abuse of inmates which was systematically applied to inmates who are Puerto Rican, who speak with accents,

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(Continued from preceding page)

during the frisk search, to avoid confusion of the facts relating to the issues presented in the petition, the three corrections officers who handled Sosa during this initial entry were absolved of the Fourth Amendment strip search claim after the first trial. R.64 Partial Verdict; R.65 Judgment. After Petitioner was again permitted to retry these facts at a second trial under the Eighth Amendment, a jury again found in favor of these three officers. R.85 Verdict; R.87 Judgment. Petitioner did not appeal from the final judgment in favor of these three officers.

[2] On pages 3 and 4 of his STATEMENT OF THE CASE, Petitioner discusses at some length his version of the circumstances leading to Sosa's arrest for public intoxication. To avoid confusion of the facts related to the issues presented in the petition, the arresting officer was a police officer employed by the City of Louisville, not a corrections officer employed by Jefferson County. R.106 A. Bybee at 2/28/96 TR 87. Neither the city police officer nor the City of Louisville was ever named as a defendant in the action. Further, the Jefferson County Department of Corrections is charged by law with the responsibility of confining those persons arrested and charged with criminal offenses and has no authority to second-guess the validity of the criminal charge. Ky. Rev. Stat. Ann. §441.005(1) and §441.025.

[3] Ky. Rev. Stat. Ann. §67B.130(1), §67B.050.

and who are homosexual or have AIDS. R.1 Complaint; Appellee's Sixth Circuit Brief.

At trial, Respondents sharply disputed Petitioner's version of the incident, with evidence that Sosa was intoxicated and argumentative upon his entry into the jail, was placed in a holding cell containing no toilet, sink or bench upon which an intoxicated, disruptive inmate might harm himself, and was eventually moved to another cell and restrained to a bench after he continually refused to stop banging on the metal door. Respondents disagree with Petitioner's description of how Sosa was restrained to the bench, as contained on page 5 of his STATEMENT OF THE CASE. There was absolutely no evidence that he was chained by the wrists and ankles to the strut of a bench. It was undisputed that Sosa was placed in a seated position on a bench, with shackles running from his wrists, then down between the two slats of the bench to his ankles, to prevent him from getting up and banging on the cell door. R.106 P. Sosa at 2/28/96 TR 62; R.106 G.S. Colvin at 2/28/96 TR 146-149.

Sergeant Brett O'Loughlin was not involved in the decision to place Sosa in shackles at 9:00 p.m. because he worked a later shift and came on duty at 11:00 p.m. R.106 O'Loughlin at 2/28/96 TR 184. O'Loughlin's only role was observing him in shackles after he came on duty, removing him from the shackles at 1:15 a.m., and directing officers to shower him and take his clothes to the laundry. R.106 O'Loughlin at 2/28/96 TR 221 to 225.

Over the objection of Respondent made prior to and during trial, Petitioner was permitted to question Sgts. Colvin and O'Loughlin about the contents of their personnel files and to introduce disciplinary actions as exhibits.[4]

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[4] Respondents disagree with Petitioner's statement on page 6 of his STATEMENT OF THE CASE that there was any evidence that Sgt. Colvin was cited for failing to control his temper.

Prior to the September 1, 1994 incident, Sergeant O'Loughlin while an officer had received three disciplinary actions for violations of department policies. On February 4, 1991, O'Loughlin was issued a one-day suspension for an inmate incident. R.109 Defendant/Appellants Notice of Filing of Trial Exhibits 8, 12, 13, 14, 14(a). Extraordinary Incident Reports completed by officers in connection with the incident indicated that O'Loughlin observed an inmate engaging in horseplay with an officer, and believing the incident to be serious, intervened and grabbed the inmate around the neck in what appeared to be a chokehold. (*Id.*). A disciplinary hearing resulted in the issuance of discipline. O'Loughlin grieved the decision and was not required to serve the suspension. R.106 B. O'Loughlin at 2/28/96 TR 196 to 201. In February 1992, O'Loughlin was given a written reprimand for spraying mace under a door to a cell holding a large number of inmates. R.106 B. O'Loughlin at 2/28/96 TR 202 to 204. The inmates had become unruly and were trying to pull the observation camera off the wall. R.106 B. O'Loughlin at 2/28/96 TR 219 to 220. Finally, on July 9, 1992, approximately two years prior to Sosa's incarceration, O'Loughlin was given a letter of documentation/counseling for transporting 21 inmates in a van designed to carry a maximum of 13 inmates, between two jail facilities located approximately three miles apart. R.109 Defendants/Appellants' Notice of Filing of Trial Exhibits, Exhibit 17. This letter stated that due to the heat, the number of inmates to be moved, and the area of traffic, the action was negligent on the part of O'Loughlin. (*Id.*). O'Loughlin was advised that any similar actions involving the transportation of inmates could result in severe disciplinary action. (*Id.*).[5]

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[5] On January 24, 1995, after the date of the September 1, 1994 incident involving Sosa, O'Loughlin placed tape over the mouth

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The department director testified Department policies were strictly enforced. R.106 O. Payne at 2/29/96 TR 2-258 to 2-662. Levels of action that could be taken by the Department were a letter of instruction, a written warning, verbal warning, suspension and termination. R.106 O. Payne at 2/29/96 TR 2-283 to 2-292. One purpose of discipline is to correct a person's behavior, and promoting an individual who has been disciplined in the past is not necessarily inconsistent because it depends on the nature of the prior disciplinary action. *Id.*

The collective bargaining agreement covered only corrections officers and sergeants and did not apply to officers with higher ranks. The nine months limitation applied to discipline issued for any type of infraction of department policies. There was no evidence that O'Loughlin was promoted solely because of the promotion policy.

Relying upon *Board of County Commissioners of Bryan County, Oklahoma* v. *Brown*, 520 U.S. ____, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997), a panel of the Sixth Circuit reversed the Judgment against the County and Department. Petitioner's petition for rehearing with suggestion for rehearing en banc was denied.

(Continued from preceding page)

of an inmate who was spitting at him instead of using a mask and was given a verbal warning the same day. R.109 Defendants/Appellants' Notice of Filing of Trial Exhibits, Exhibit 17. In addition to objecting to the introduction of any of the personnel records, Defendants argued this later discipline should not be introduced. R.106 Motion in Limine at 2/28/96 TR 5-8.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT'S RELIANCE UPON *BROWN* DOES NOT RESULT IN A DECISION CREATING A MUNICIPAL LIABILITY STANDARD IN CONFLICT WITH THIS COURT'S DECISIONS IN *MONELL, TUTTLE, CANTON,* AND *BROWN.*

The Sixth Circuit was correct in applying this Court's decision in *Brown*. The Sixth Circuit's reliance upon *Brown* did not create a standard of municipal liability in direct conflict with previous decisions of this Court, nor did the Sixth Circuit incorrectly analyze the *Brown* decision.

Although the issue in *Brown* concerned a single decision by a final policymaker, the Brown decision did not establish greater or different rigorous standards of proof than that required for other theories of municipal liability. *Brown* applied the standards and principles of culpability and causation already established by this Court in *City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), *Oklahoma City v. Tuttle,* 471 U.S. 808, 105 S.Ct. 2427, 471 U.S. 808 (1985), and *Monell v. New York Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *Brown* reaffirmed the principles set forth in these earlier decisions that municipal liability requires more than proof of municipal conduct and proof of a plaintiff's unconstitutional injury. A plaintiff must prove the municipal conduct was taken with the requisite degree of culpability and must further establish a direct causal link between the unconstitutional "policy" or "custom" and the unconstitutional injury.

A. The Standards and Principles of Municipal Liability as Developed in the *Monell, Tuttle,* and *Canton* Decisions and Applied in *Brown.*

Before municipal liability can be imposed in a 42 U.S.C. §1983 action, a plaintiff is required to identify and prove a

"policy" or "custom" which caused his particular constitutional injury. *Monell, Tuttle, Canton, Brown.* A municipal "policy" is a formally approved ordinance, regulation, or decision of a municipal body or a decision by an official "whose edicts or acts may fairly be said to represent official policy." *Monell* at 690-691, 694. A municipal "custom" includes those customs or practices which, although not formally approved, are so widespread, permanent and well-settled so as to have the force of law. *Monell*, at 690-691.

> [T]he notion of "law" must include "deeply embedded traditional ways of carrying out state policy". . . It must reflect a course of action deliberately chosen from among various alternatives. . . In short, a "custom" is a "legal institution" not memorialized by written law. [Citations omitted].

Doe v. Clairborne County, Tennessee, 103 F.3d 495, 507-8 (6th Cir. 1996).

In addition to requiring proof of a municipal policy or custom, *Monell* requires proof that the policy or custom *caused* the constitutional violation so that the policy or custom is in essence the "moving force" behind the constitutional violation. 436 U.S. at 694. In *Monell*, the maternity leave policy was clearly a municipal policy and the policy was unconstitutional. Therefore, once the *Monell* plaintiffs established that the policy was applied, the direct causal link was established. *Tuttle, Canton, and Brown* make clear, however, that not every policy decision or custom is a municipal "policy" or "custom" within the meaning of *Monell*, and a plaintiff must establish by evidence fault and causation — an unconstitutional policy or custom directly linked to the constitutional violation.

In *Tuttle* (Opinion of Rehnquist, J.), a police officer shot a person who did not obey orders to stop. The plaintiff's theory of liability was that the city's policy of supervision and training resulted in inadequate training and caused the constitutional violation. A jury was allowed to infer an

unconstitutional municipal policy of inadequate training and supervision from the evidence of the shooting. The *Tuttle* opinion stated liability cannot be imposed against a municipality on the basis of a single incident if the policy at issue is not itself unconstitutional. 471 U.S. at 822-824. Because "policy" implies a "course of action consciously chosen from among various alternatives," there must be evidence that a municipality deliberately chose to have a policy or make a decision which was constitutionally inadequate. *Id.* In addition, a plaintiff must establish an "affirmative link" between this municipal policy and the constitutional violation. *Id.* An affirmative link is not established by evidence the unconstitutional municipal policy "might lead to" a constitutional violation. *Id.*, n. 8. *Tuttle* emphasized the *Monell* requirements are rigorous, and stated a single incident could not satisfy this fault and causation requirement. *Id.*

In *Canton*, an arrestee exhibited symptoms of an emotional illness while in police custody and no medical care was rendered. The plaintiff asserted municipal liability based on the failure of the city to provide training, other than first-aid, to enable staff to determine when to summon medical care. The Court held that municipal liability can be imposed for failure to train only where the inadequacy or inaction evidences a "deliberate indifference to the rights of person with whom the police came into contact." 489 U.S. at 388. Further, the Court stated that a plaintiff cannot establish a *Monell* policy merely by producing evidence that a training program is inadequate. The plaintiff must establish that the inadequacy "can justifiably be said to represent" municipal policy because "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers can reasonably be said to have been deliberately indifferent to the need." *Id.* at 389-390. Moreover, a plaintiff must establish that the

deficiency is closely related to the ultimate injury. *Id.* at 391. Reasoning from *Monell* and *Tuttle*, the Court stated that this standard satisfied the *Monell* requirement of fault and causation, because only where a policy represents a "deliberate choice to follow a course of action from among various alternatives" and is the "moving force" behind a constitutional violation can liability be imposed. *Id.* Therefore, that a particular officer may be unsatisfactorily trained, or that more or better training could have been provided, is insufficient to impose liability. *Id.* at 390-391. In a separate opinion concurring in part and dissenting in part, Justice O'Connor stated that the deliberate indifference standard properly required evidence giving notice to a municipality of a need for change so that the failure to act is in essence a decision to violate the Constitution. *Id.* at 395. Justice O'Connor also stated that an obvious need for training could be established by evidence that policymakers "acquiesced in a pattern of constitutional violations involving the exercise of police discretion" closely related to the injury at issue, or established by showing a municipality failed to train "concerning a clear constitutional duty implicated in recurring situations that a particular employee is certain to face." *Id.* at 396-397.

B. The *Brown* Decision

In *Brown*, the issue was whether a single, not unconstitutional, decision by a policymaker governing one employee could nevertheless amount to municipal policy — a deliberate, conscious choice to violate the Constitution — in the absence of evidence of a pattern of past constitutional violations that could be directly linked to the plaintiff's injury. In addressing this issue, the Court first stated that its decision in *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) does not mean that a plaintiff can establish municipal liability by proof of municipal action and proof of his unconstitutional injury.

The Court again emphasized that *Monell* requires proof of a municipal policy or custom which was the "moving force" behind the constitutional violation.

Then, relying upon *Canton, Tuttle,* and *Monell,* the Court stated that if a decision is not itself unconstitutional, rigorous standards of culpability apply and a plaintiff is required to establish that the decision was taken with deliberate indifference to Constitutional rights. Further, because of that standard's requirement of a municipality's "failure to act in the face of an obvious need," evidence of a pattern of violations over time with respect to multiple employees puts the municipality on notice of the obvious need to make a change. The Court stated that, even though *Canton* left open the possibility of liability based on failure to train without evidence of a pattern of violations, a plaintiff is still required to "demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." 117 S.Ct. at 1392. Recognizing that predicting the consequences of a hiring decision is difficult and a decision to hire after inadequate scrutiny may create only a generalized risk, the Court held that fault and causation are established only where a scrutiny would lead to a conclusion that the "plainly obvious consequence" of the decision to hire that particular officer was that the officer would inflict the "particular" injury suffered by a plaintiff. *Id.* at 1392-1394.

C. Application of the Standard of Municipal Liability Set Forth in *Monell, Tuttle, Canton,* and *Brown* to this Case.

The Sixth Circuit found that Petitioner never established by evidence an unconstitutional municipal policy or custom which was the moving force behind the unconstitutional injury. As is clearly established in the *Monell, Tuttle, Canton,* and *Brown* decisions, proof of constitutional mu-

nicipal action in the face of proof of an unconstitutional injury is insufficient to establish municipal liability.

First, Petitioner did not and could not prove the existence of a Jefferson County policy stating that officers would not be disciplined for the unconstitutional use of inmate restraints or for the unconstitutional use of excessive force. Further, evidence that one officer received three disciplinary actions for violations of department policies in his handling of inmates does not amount to a policy evidencing a deliberate choice of failing to discipline for the unconstitutional use of force against inmates. This is especially true where the prior instances of discipline bear no resemblance to Petitioner's allegations. Finally, Petitioner produced no evidence that the disciplinary actions taken had been inadequate. The actions taken were evidence of a policy of Jefferson County to discipline for violations of department policies.

Second, the promotion "policy" as established through the testimony of the acting director of the department was not an unconstitutional policy. The policy was applied to any type of departmental infraction, applied only to officers and sergeants, and was accompanied by the department's disciplinary policy allowing discipline up to termination of employment. In the absence of evidence of a pattern of unconstitutional injuries similar in nature to those suffered by Sosa, there could be no competent evidence the County was deliberately indifferent to an "obvious need for change" or that there was a direct causal link between this policy and the injuries.

In relying upon *Brown*, the Sixth Circuit recognized Petitioner in this case did not present evidence of a pattern pointing to a county policy or custom demonstrating a conscious choice of failing to discipline officers for the unconstitutional use of force or of placing officers who would use unconstitutionally excessive force into positions of au-

thority. Therefore, the Sixth Circuit correctly applied the *Brown* decision to determine the only possible basis for municipal liability given the evidence at trial — whether the "plainly obvious consequence" of the single decision to promote officer O'Loughlin to sergeant was that this particular officer would inflict this "particular injury" suffered by "this particular plaintiff."

The Sixth Circuit properly analyzed the record of the evidence presented, and determined Petitioner presented insufficient evidence of municipal culpability and direct causal link.

II. THE ISSUANCE OF A WRIT OF CERTIORARI MERELY TO REEXAMINE THE DOCTRINE OF RESPONDEAT SUPERIOR IS NOT APPROPRIATE IN THIS CASE.

Because the Sixth Circuit did not reach a decision in direct conflict with precedent of this Court, and the Sixth Circuit correctly analyzed the *Brown* decision, the issuance of a writ of certiorari to reexamine whether the doctrine of *respondeat superior* should be applied to municipalities is not appropriate. Further, Petitioner did not raise this argument before the Sixth Circuit. Finally, although Petitioner appears to suggest that Kentucky's indemnification statute moots the issue of *respondeat superior,* the Kentucky Supreme Court recently held that sovereign immunity is absolute, in spite of the language contained in Ky. Rev. Stat. Ann. §65.2005. *Franklin County v. Malone, Ky.*, 957 S.W.2d 195, 204 (1997).

CONCLUSION

For the foregoing reasons, Respondents request this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

COLIN LINDSAY, EXECUTOR OF THE ESTATE OF PEDRO SOSA, DECEASED,

Petitioner,

v.

JEFFERSON COUNTY AND JEFFERSON COUNTY DEPARTMENT OF CORRECTIONS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

In their Brief in Response to Petition for Writ of Certiorari, Respondents, Jefferson County and the Jefferson County Department of Corrections, adopt the Sixth Circuit's erroneous interpretation of *Board of County Commissioners v. Brown*, 520 U.S. ___, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). As a result of this erroneous interpretation, Respondents advance several arguments that are inconsistent with *Brown*.

First, Respondents argue that, in the absence of evidence of a pattern of constitutional *injuries* similar in nature to those suffered by Sosa, there can be no evidence that Jefferson County was deliberately indifferent to an obvious need for change. Resp. Brief at 11. By focusing on the nature of the *injury* rather than the unconstitutional *conduct* of the corrections officers, Respondents misconstrue the rule set forth in *Brown*. Respondents' interpretation of *Brown* would allow municipalities to acquiesce to infinite constitutional violations, so long as municipal employees inflicted different types of injuries. Under *Brown*, the focus is on the propensity of an officer to use excessive force, whatever the form.

Second, Respondents deny liability on the ground that "Petitioner did not and could not prove the existence of a Jefferson County policy stating that officers would not be disciplined for the unconstitutional use of inmate restraints or for the unconstitutional use of excessive force." Resp. Brief at 11. Petitioner has never claimed that Jefferson County officials would be so bold as to create a written policy affirmatively approving constitutional violations. Instead, Petitioner has argued, consistent with

prior opinions of this Court, that Jefferson County's repeated failure to effectively discipline the unconstitutional use of force amounts to a policy of acquiescence. Indeed, as this Court has stated, the "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action – the "deliberate indifference" – necessary to trigger municipal liability." *Brown*, 520 U.S. at ___, 117 S. Ct. at 1390, 137 L. Ed. 2d at 641.

Third, Respondents attempt to draw a distinction between conduct that amounts to a violation of department policies and conduct that rises to the level of a violation of constitutionally protected rights. According to Respondents, because Officer O'Loughlin only violated departmental policies, this does not amount to a failure on the part of Jefferson County to punish the unconstitutional use of force. While this distinction certainly exists in theory, it is inapplicable to this case. O'Loughlin's past conduct certainly constituted a violation of department policies as well as a violation of the constitutional rights of inmates. That Jefferson County never considered such conduct serious enough to constitute a constitutional violation further evidences the inadequacy of Jefferson County's disciplinary procedures.

Finally, Respondents rely on sovereign immunity in response to Petitioner's claim that *respondeat superior* in the context of municipal liability should be reexamined. This Court has held that state sovereign immunity is insufficient to defeat a federal civil rights claim under 42 U.S.C. § 1983 against a municipality. *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990).

The Sixth Circuit incorrectly interpreted the rule of law set forth in *Brown*. Furthermore, the arguments advanced by Respondents indicate a fundamental misunderstanding of this Court's prior decisions, including *Brown*. This incorrect interpretation of *Brown* by both the Sixth Circuit and Jefferson County provides the most compelling reason for this Court to grant the Petition for Writ of Certiorari in this case. *Brown* must be clarified; otherwise, it will continue to be misinterpreted by courts and municipalities alike, to the detriment of § 1983 claimants and the constitutional principals they seek to protect.

For the reasons set forth in the Petition, Petitioner respectfully requests this Court issue a writ of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered on September 29, 1997.

Respectfully submitted,

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